Seton Company *and* United Mine Workers of America, AFL–CIO. Cases 6–CA–26593, 6–CA–26675, 6–CA–26746, 6–CA–26870, 6–CA–26927, 6–CA–26962, 6–CA–27045, 6–CA–27071 (1–3), 6–CA–27128–2, 6–CA–27141, 6–CA–27142, 6–CA–27418, 6–CA–27469, 6–CA–27492, and 6–CA–27783

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On December 31, 1997, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by disparately enforcing its no-solicitation/no-distribution rule (rule)[5] against prounion employees' activities while knowingly permitting solicitation and distribution of antiunion material. We agree with the judge that there is substantial evidence of disparate enforcement of the rule.

The judge found, and we agree, that the Respondent strictly enforced its rule against union supporters. The credited evidence shows several instances of strict enforcement of the rule with respect to prounion activity. Thus, on September 9, 1994, employee Mark White and three other union supporters requested permission from human resources manager, Mark Taylor, to post union literature on bulletin boards and distribute literature at work. On September 15 Taylor gave those employees a memo granting the employees permission to post literature on the employee lunchroom bulletin board and distribute literature in the lunchroom, but prohibiting the distribution of literature during working times and in work areas. In addition, in mid-September 1994 union supporter, Glenn Leavelle, was told by supervisor, Jim Donaldson, that when going onto the production floor he was not to stop and talk to anyone or ask any questions, especially about the Union. In mid-February 1995, Donaldson warned Leavelle that if he got caught talking about the Union he could be fired.[6]

[1] The Respondent has moved to reopen the record to obtain the testimony of supervisor, Steve Putt, who the judge found made the decision to discharge employee Lynn Wesley. Putt was unable to testify because of an emergency business meeting out of the country. The Respondent contends in its exceptions that because it was "not foreseeable that the ALJ would seize on Putt as the culprit, there was no reason for calling him as a witness." We deny the Respondent's motion to reopen the record. The Respondent has not presented extraordinary circumstances warranting the reopening of the record, nor is there evidence that the Respondent seeks to introduce newly discovered or previously unavailable evidence. The Respondent is merely seeking an opportunity to change its initial trial strategy. We disagree with the Respondent that it was not foreseeable that the judge would find Putt to be "the culprit." Because Tina Detterline, the third shift cutting supervisor, was on vacation at the time the alleged chalk problems occurred, it should have been foreseeable that Putt would have been needed to testify concerning the chalk problems and the ensuing discipline, which Putt both initiated and carried out. Further, we observe that although the judge credited Wesley's testimony in the absence of a denial by Putt, the judge did not draw an adverse inference from Putt's failure to testify. Thus, the Respondent has not shown any undue prejudice from its failure to call Putt as a witness. For these reasons, the Respondent's motion to reopen the record is denied. See Sec. 102.48(d) of the Board's Rules and Regulations.

[2] No exceptions were filed to the judge's dismissals of allegations discussed in secs. B,1, 3, 6(d), C,2. par. 10, and C,3 of his decision.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We shall modify the judge's conclusions of law, recommended Order, and notice to correct inadvertent omissions and to conform to the violations found.

[5] The rule reads as follows:

> SETON PROHIBITS SOLICITATION AND DISTRIBUTION BY ANY EMPLOYEE DURING WORKING TIME. DISTRIBUTION IN WORK AREAS IS STRICTLY PROHIBITED AT ANY TIME ON SETON PREMISES.
>
> DISTRIBUTION INCLUDES FLYERS, LEAFLETS, ADVERTISEMENTS OR CARDS FOR ANY PURPOSE. NO NOTICE MAY BE POSTED ON SETON'S PREMISES WITHOUT THE PRIOR WRITTEN AUTHORIZATION OF THE HUMAN RESOURCES MANAGER.
>
> IN ORDER TO COMPLY WITH ESTABLISHED LAW, SETON MUST STRICTLY ADHERE TO UNIFORMLY ENFORCING ITS NO SOLICITATION - NO DISTRIBUTION GUIDELINES.

[6] For the reasons set forth later in our decision relating to the Respondent's 10(b) defense, we rely only on Donaldson's February 1995 warning to establish disparate application of the rule against prounion employees. The September 1994 events are set forth here as "background evidence to shed light on allegedly unlawful conduct occurring during the 10(b) period." *Mechanics Laundry & Supply*, 240 NLRB 302, 303 (1979).

In finding that the Respondent disparately enforced its no-solicitation/no-distribution rule, the judge also relied on another incident in February 1995, in which Donaldson unlawfully threatened plant

The judge also found substantial credible evidence that during the same time period that the Respondent was strictly enforcing its rule against union supporters, the "Respondent knowingly allowed its employees to solicit support for the Company by talking against the Union, distributing and allowing employees to distribute antiunion petitions for employee signatures and distributing and allowing employees to distribute items indicating support for the Company in work areas on work time." In agreeing with the judge that the Respondent engaged in disparate enforcement of its rule, we do not rely on any incidents of (1) supervisory distribution of antiunion materials,[7] (2) antiunion solicitation or distribution not proven to have occurred in the presence of supervisors, or (3) antiunion solicitation not clearly shown to have occurred during working time. However, we find that the following incidents of employee antiunion distribution and solicitation condoned by the Respondent are sufficient to support the judge's conclusion that the Respondent disparately enforced its rule.

(a) In January 1995 employee Mark White observed an employee together with production manager, Steve Putt, handing out "vote no" hats to employees during worktime. As noted above, we do not rely on the distribution by Putt, but we do rely on Putt's presence at the time that the other employee was passing out "vote no" hats. It is clear from this incident that the Respondent was aware of, and condoned, the employee's distribution of antiunion paraphernalia in violation of the rule.

(b) In February 1995 White observed an employee, Chris Rankin, with a box of antiunion clothing and insignia at his workstation. Supervisor Jennifer Black took some material from the box and put it under the worktable at employee Sandy Dotson's workstation. Later, other employees went to Dotson's workstation and took some of the items. These events all took place during worktime. While we do not rely on supervisor Black's distribution of the paraphernalia to Dotson as evidence, by itself, of disparate enforcement, we find this chain of distribution sufficient to warrant a finding that the Respondent was aware of, and condoned, the distribution of antiunion materials by employees during worktime and in work areas.

(c) Around February 1, 1995, employee Phyllis Colledge observed employee Donna Lowe, in the presence of supervisors, White and Dave Ritchey, passing out antiunion paraphernalia in the workplace on worktime to employees Tom Rampert, Lance Reed, Carla Ramsey, and Connie Reed. The employees then went into the bathroom and put on the material. The supervisors observed, but did not stop this activity.

(d) On February 23, 1995, Colledge observed Lowe talking about and against the Union with another employee for 15–20 minutes in the workplace on worktime. Supervisors Richey and White observed this conversation but, did nothing to stop it.

This credited evidence shows that the Respondent engaged in a pattern of conduct in which it knowingly allowed its employees to engage in antiunion solicitation and distribution in violation of its rule, while at the same time strictly enforcing its rule with respect to prounion activities. These incidents of disparate enforcement cannot be characterized as isolated. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by the disparate enforcement of its no-solicitation/no-distribution rule.

2. The judge found that the Respondent, by Supervisor Wayne Claar, violated Section 8(a)(1) of the Act by creating the impression of surveillance. In his decision, the judge found that Claar created an impression of surveillance when during a telephone conversation he told employee Donald Frederick to be careful and watch himself because the Respondent was watching Hiquet's Gym (Gym), the location of the union's headquarters. Without making a factual finding as to whether Claar or Frederick first mentioned the topic of the Respondent's surveillance, the judge concluded that Claar's statement gave employees the clear impression that their union activities were being monitored by the Respondent. We agree.

Although the Respondent argues in its exceptions that no violation could be found because of the judge's failure to make a factual finding as to whether Claar or Frederick initiated the subject of surveillance, we find that the uncontradicted evidence shows that Claar clearly indicated to Frederick that management was watching the union hall and noting the comings and goings of the employees. Therefore, whether Frederick or Claar first mentioned the surveillance, we conclude that Claar's comment would reasonably lead employees to believe that their union activities were under surveillance. Accordingly, we adopt the judge's finding that the Respondent created an impression of surveillance in violation of Section 8(a)(1) of the Act.[8]

closure and more onerous working conditions if the Union came into the plant. We do not rely on this incident as evidence that the Respondent unlawfully disparately enforced its no-solicitation/no-distribution rule. However, as set forth below, we agree with the judge that these threats independently violated Sec. 8(a)(1) of the Act.

[7] See *Fairfax Hospital,* 310 NLRB 299 fn. 3 (1993), enfd. 14 F.3d 594 (4th Cir. 1993).

[8] The judge also found that supervisor, Clair Horton, violated Sec. 8(a)(1) of the Act by creating the impression of surveillance. In light of the Wayne Claar violation, we find it unnecessary to pass on the Clair

3. The judge found that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance and creating the impression of surveillance by the videotaping of Hiquet's Gym and by the Respondent's procompany video.[9] The judge found that although the filming of the Gym was brief, it had the tendency to intimidate the employees in the exercise of their Section 7 rights because it demonstrated that the employees' activities were being observed by management. We agree.

The uncontradicted evidence showed that the Respondent contracted with Projections, Inc. to produce a procompany videotape to be shown to employees. The videographer, William Upchurch, was instructed to take a picture of Hiquet's Gym for use in the video.[10] On February 15, 1995, Upchurch, accompanied by his assistant and a company employee, took a 5 to 10 second shot of the Gym from a point across from the Gym. At the time of the videotaping, Union Organizer Richard Trinclisti, former employee Lynn Wesley, and employee Michael Way were present at the union's headquarters. Almost immediately, Thressa Hiquet came out of the Gym and began screaming at the video crew. Upchurch and his crew then left the scene. Hiquet promptly informed Trinclisti of the incident. Thereafter, an exterior shot of Hiquet's Gym appeared for 1 or 2 seconds in the Respondent's video that was distributed to all the employees.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by videotaping the union's headquarters and using that image in the videotape distributed to all employees. By this conduct, the Respondent both created the impression of surveillance and engaged in actual surveillance of union activities. The videotaping of the Gym was coercive because the image of the building was not merely a picture of the outside of an unidentifiable structure, but was a still frame of the union's headquarters. Thus, the employees who saw that the Gym was videotaped could justifiably assume that their union activities were under surveillance. This assumption is reasonable, particularly, in light of the statement by Supervisor Claar, found unlawful above, that employee Frederick should be careful because the Respondent was watching Hiquet's Gym. For this reason, we find that the videotaping of the Gym had the tendency to be intimidating both to those who may have been aware of the filming at the time it occurred and to those who viewed the tape at a later time period.[11] Accordingly, we find that the Respondent's above conduct has the reasonable tendency to coerce employees in the exercise of their Section 7 rights and therefore violates Section 8(a)(1) of the Act.

4. The judge found that the Respondent, by Supervisor Jim Donaldson, violated Section 8(a)(1) of the Act by interrogating employees about their union membership and activities, and threatening employees with discharge, more onerous working conditions, and plant closure in the event the Union were selected.[12] Specifically, the judge credited employee Leavelle's testimony that in mid-February 1995 Donaldson questioned Leavelle about whether he and another employee had been talking about the Union and warned him that if he was caught talking about the Union he could be fired. Further, later in February, Leavelle overheard Donaldson tell two other employees that if the Union came in things would get "shitty" and that the Saxton plant would shutdown if the union "comes in and the wages go up." The judge concluded that even though Leavelle was an open union supporter, Donaldson's threats were clearly coercive and violated Section 8(a)(1) of the Act. We agree with the judge that these statements conveyed a message to the employees that if they engaged in union activity the Respondent would reciprocate with reprisals, since Donaldson cited no objective basis for the statements. *Gissel Packing Co.*, 395 U.S. 575 (1969).

Horton allegation because the additional finding would be cumulative and would not affect the Order.

[9] In its brief in support of exceptions, the Respondent argues that the "pro-Company videotape in which the still frame appears is not the subject of a Complaint allegation; therefore, the ALJ's sua sponte finding that the pro-Company video itself creates the impression of surveillance contravenes Sec. 10(b) and tramples the Company's right to due process." We disagree. "It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Here, par. 14 of the complaint alleges that the Respondent, by Projections, Inc., engaged in the surveillance of union activities and created the impression among employees that their union activities were under surveillance and the issue in question was fully litigated at the hearing. Thus, both parts of the *Pergament* test are satisfied, and there is no merit to the Respondent's contention.

[10] The second floor of that building was leased to the Union for use as its campaign headquarters.

[11] Further, although the Respondent argues that there is no evidence that any of the Respondent's employees were aware of the filming at the time it occurred, we observe that former employee and discriminatee Wesley and employee Way were at the union headquarters at the time of the incident. Moreover, even if Wesley and Way were not aware of the videotaping at the time it occurred, Thressa Hiquet was aware of it. Although, she was not an employee of the Respondent at the time of the incident, she had applied for a position with the Respondent, and the Respondent had discriminatorily refused to hire her. Thus, she would have been an employee but for the Respondent's violation of Sec. 8(a)(3).

[12] The judge relied on the facts set forth in Sec. 2 of his decision regarding Donaldson's disparate enforcement of the Respondent's no-solicitation/no-distribution rule.

Although the judge also concluded that Donaldson's interrogation of Leavelle violated Section 8(a)(1), he failed to set forth a rationale for so finding. For the following reasons we agree with the judge that Donaldson's interrogation violated Section 8(a)(1).

In determining whether an employer's interrogation violates the Act, the Board examines whether under all the circumstances the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[13] In this case, the interrogation occurred against a background of numerous other unfair labor practices including threats of plant closure, discharge, and more onerous working conditions. Further, Donaldson's inquiry as to whether Leavelle and another employee had been discussing the Union was explicitly tied to Donaldson's unlawful threat of discharge if Leavelle were caught talking about the Union. Thus, the inquiry was intended to obtain information based on which Leavelle could be disciplined. Under all these circumstances, we find that Donaldson's interrogation tended to interfere with, restrain, and coerce employees in the rights guaranteed by Section 7 of the Act.

5. We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) of the Act when supervisors, Michael Clouse and Patty Wise, threatened employees with plant closure.[14]

6. The Respondent has raised as affirmative defenses the claim that it was denied due process and that the allegations set forth in paragraphs 10, 12, 15, 16, and 23(b) of the second Order further consolidating cases and amended consolidated complaint dated February 7, 1996 (hereafter referred to as complaint), were time barred pursuant to Section 10(b) of the Act.[15] The judge rejected these defenses. For the following reasons, except as noted below, we agree with the judge that the Respondent has not met its burden of proving those defenses. In sum, our rationale is two fold. First, we shall identify below the specific charge allegation that is legally sufficient to support each complaint allegation in issue. Second, we will explain why the Board's recent decision in *Ross Stores,* 329 NLRB 573 (1999), provides an additional basis for finding that all the complaint allegations are not barred by Section 10(b).

(a) Complaint paragraph 10

The Respondent argues that complaint paragraph 10 is barred by Section 10(b) of the Act.[16] For the reasons set forth below, we find that complaint paragraphs 10(b) and (c) of the complaint are not barred by Section 10(b) of the Act.[17]

Amended charge Case 6–CA–27071–3, filed on June 7, 1995, alleged as follows:

> Since early September 1994, and at all times thereafter, the [Respondent], by its officers, agents and representatives, has, by making implied threats of plant closure, threats of discharge, interrogation, threats of partial plant closure, threats of surveillance and implied threats of discipline and other acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The unfair labor practice findings alleged in paragraphs 10(b) and (c) of the complaint involve conduct which occurred within 6 months of the date amended charge Case 6–CA–27071–3 was filed. Specifically, paragraph 10(b) alleges that about mid-February 1995 the Respondent interrogated employees about their union membership, activities, and sympathies. Paragraph 10(c) alleges that about mid-February 1995 the Respondent impliedly threatened employees with discipline if the employees talked about the Union.

In deciding whether a charge allegation provides a sufficient basis for a complaint allegation, the Board examines whether the allegations that are asserted to be barred by Section 10(b) are "closely related" to the allegations of a timely filed charge. In applying this test, the Board considers the following factors: (1) whether the allegations involve

[13] *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985).

[14] In affirming the judge's finding that on February 15, 1995, Wise threatened plant closure when she stated to employees that the Company would slowly move out if the Union came in, we do not rely on her statement that her husband was screwed by the Union. We also find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act when Chairman/CEO Phillip Kaltenbacher impliedly threatened plant closure if the employees selected the Union. In light of the Wise and Clouse plant closing threat violations, a finding of an additional unlawful plant closure threat would be cumulative and would not materially affect the Order.

[15] The judge stated that the Respondent was contending that complaint pars. 9, 10 (the judge inadvertently referred to 19 rather than 10 in par. 1 of sec. D of his decision), 11, 12, 13, 15, 16, 17, 23(b), and 25 were barred by Sec. 10(b). However, the Respondent now contends only that pars. 10, 12, 15, 16, and 23(b) are time barred. (The Respondent states in its exceptions that it does not have a procedural or timeliness argument regarding pars. 9, 13, 17, and 25.) We further observe that par. 11 merely sets forth the factual predicate to par. 12 and does not in itself allege any unfair labor practices.

[16] Par. 10 reads, in pertinent part, as follows:

> 10. Respondent, by Donaldson, at the die shop:
> (a) About September 15, 1994, impliedly threatened employees with discipline if employees talked about the Union.
> (b) About mid-February 1995 . . . interrogated employees about their union membership, activities and sympathies.
> (c) About mid-February 1995 . . . impliedly threatened employees with discipline if the employees talked about the Union.

[17] The Respondent also contends that par. 10(a) of the complaint is barred by Sec. 10(b) of the Act. We find it unnecessary to adopt the judge's unfair labor practice finding with respect to this paragraph because it is cumulative in light of other similar violations and would not materially affect the Order. Therefore, we do not address the Respondent's 10(b) argument concerning this allegation. We have amended the judge's conclusions of law, inter alia, to delete this unfair labor practice finding.

the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the Respondent would raise similar defenses to both allegations. See *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc*., 290 NLRB 1115 (1988).

We find that all of these factors are satisfied here. First, the amended charge and complaint allegations 10(b) and (c) involve the same section of the Act (Section 8(a)(1)) and the same legal theory (interference with employees' Section 7 right to select the Union as their collective-bargaining representative). Second, both sets of allegations involve the same types of conduct. Interrogation and implied threats of discipline are specifically alleged in both the amended charge and the complaint. Third, the amended charge and complaint allegations 10(b) and (c) share common defenses. The Respondent relied on Donaldson's testimony in defending against the two sets of allegations. Thus, we find that under the Board's "closely related" test, the allegations of the amended charge are sufficient to support the allegations of paragraphs 10(b) and (c) of the complaint**.**

(b) Complaint paragraph 12

The Respondent argues that this allegation is barred by Section 10(b) of the Act because it was not contained in any pending charge.[18] We disagree. First, charge Case 6–CA–26746, filed on June 7, 1995, alleges, inter alia, that since September 8, 1994, the Respondent "has, by implementing and discriminatorily applying an overly broad no solicitation/no distribution policy and other acts and conduct interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act." Although, the Respondent correctly points out that part of this charge was dismissed by the General Counsel on June 9, 1995, we find that the General Counsel's dismissal letter, in conjunction with the Order consolidating cases, consolidated complaint and notice of hearing also issued on June 9, 1995, which contained this allegation (as par. 11), must be read as retaining the discriminatory application allegation.

The pertinent portion of the dismissal letter reads as follows:

> In addition, there is insufficient evidence to establish a violation with regard to the allegation that the Employer promulgated and implemented an overly broad no solicitation/no distribution policy. I am, therefore, refusing to issue a complaint with respect to the above-mentioned allegation. However, insofar as the charge otherwise alleges that the Employer has violated Section 8(a)(1) of the Act, the charge is being retained for such further action as may be appropriate.

Thus, the dismissal letter does not specifically dismiss the discriminatory application allegation. Rather, it appears to be dismissing only the allegation that the no-solicitation/no-distribution rule promulgated and implemented by the Respondent was overly broad on its face. Further, it is clear that the General Counsel did not intend to dismiss the discriminatory application theory of a violation because the Order consolidating cases, consolidated complaint and notice of hearing, which contained that allegation, was issued on the very same day that the dismissal letter was issued. For these reasons, we disagree with the Respondent that there is no pending charge containing that allegation.

Alternatively, even if the Respondent were correct that the General Counsel's dismissal letter covered the discriminatory application allegation, we would find that this complaint allegation is closely related to amended charge Case 6–CA–27071–3 alleging, inter alia, implied threats of discipline. In *Redd-I*, 290 NLRB at 1116, the Board stated that it would apply the traditional "closely related" test without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed. Applying the *Redd-I* test set forth above, we find that all three factors are satisfied here. First, the amended charge and complaint allegation in paragraph 12 involve the same section of the Act (Section 8(a)(1)) and the same legal theory (interference with employees' Section 7 right to select the Union as their collective-bargaining representative). Second, both sets of allegations involve the same conduct. Thus, as discussed above, the disparate application allegation in paragraph 12 of the complaint is predicated on Donaldson's warning to Leavelle in February 1995 that he could get fired if he were caught talking about the Union. This is the same conduct which we have found above was supported by the implied threat of discipline alleged in amended charge Case 6–CA–27071–3, timely filed on June 7, 1995. Third, the amended charge and complaint paragraph 12 share common defenses. The Respondent relied on Donaldson's testimony in defending against both sets of allegations. Thus, we find that under the Board's "closely related" test the allegations of the amended charge Case 6–CA–27071–3 are sufficient to support paragraph 12 of the complaint.

We agree with the Respondent, however, that we cannot base a discriminatory application violation on any incidents occurring more than 6 months before June 7, 1995, when charge Case 6–CA–26746 and amended charge Case 6–CA–27071–3 were filed. For this reason,

[18] Par. 12 of the complaint alleges as follows:

> About September 15, 1994, and on two occasions in about mid-February, 1995 . . . Respondent, by Donaldson, at the die shop, enforced the rule described above in par. 11 selectively and disparately by applying it only against employees who formed, joined or assisted the Union.

as set forth in section 1 above, we do not rely on any incidents occurring in September 1994 to support our unfair labor practice finding. We find, however, that the February incident involving Donaldson and Leavelle in which prounion solicitation was restricted, in conjunction with the evidence that antiunion solicitation was permitted during the same period, is sufficient to warrant a finding that within 6 months of a timely filed charge the Respondent disparately applied its no-solicitation/no-distribution policy against union supporters. Accordingly, we decline to dismiss this allegation and find, for the reasons set forth above, that the Respondent violated Section 8(a)(1) of the Act by disparately enforcing its no-solicitation/no-distribution policy against union supporters.

(c) Complaint paragraphs 15 and 16

Complaint paragraph 15 alleges that about February 17, 1995, the Respondent, by Michael Clouse, threatened employees with plant closure if the union campaign was successful. Paragraph 16 alleges that about February 15, 1995, the Respondent, by Patty Wise, threatened employees with plant closure if the union campaign was successful. The Respondent argues that these paragraphs were improperly included in the complaint because they were investigated under charge Case 6–CA–27071–2 and were dismissed by the General Counsel on June 9, 1995. Therefore, the Respondent contends that these paragraphs must be dismissed under *Ducane Heating Corp*., 273 NLRB 1389 (1985), enfd. 785 F.2d 304 (4th Cir. 1986), in which the Board held that a dismissed charge may not be reinstated outside the 6-month limitations period absent fraudulent concealment of the operative facts underlying the alleged violation. We disagree and find that these allegations are supported by pending timely filed amended charges Cases 6–CA–27071–1 and 6–CA–27071–3.

In *Redd-I*, supra, 290 NLRB at 1116, the Board considered *Ducane*, but stated that we would apply the traditional Board test to determine if an untimely allegation is factually and legally related to the allegations of a timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed. The Board found that *Ducane* did not apply because that case did not involve an attempt to add closely related allegations to a pending charge. The relevant inquiry is not the existence of another withdrawn or dismissed charge, but "whether there is a timely charge now pending that would support the new untimely allegation." Id.

Assuming arguendo that the Respondent is correct that these allegations were dismissed in Case 6–CA–27071–2, we find that under the "closely related" test, complaint paragraphs 15 and 16 are supported by pending amended charges Cases 6–CA–27071–1 and 6–CA–27071–3, filed on June 7, 1995. Amended charge Case 6–CA–27071–1 alleges, inter alia,

> Since on or about February 17, 1995, and at all times thereafter, the [Respondent] has, . . . by making threats of plant closure and other acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

As discussed above, amended charge Case 6–CA–27071–3 alleges, inter alia,

> Since early September 1994, and at all times thereafter, the [Respondent], by its officers, agents and representatives, has, by making implied threats of plant closure, threats of discharge, interrogation, threats of partial plant closure, threats of surveillance and implied threats of discipline and other acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

We find that complaint paragraphs 15 and 16 are closely related to these pending amended charges. First, the amended charges and complaint allegations involve the same section of the Act (Section 8(a)(1)) and the same legal theory (interference with employees' Section 7 right to select the Union as their collective-bargaining representative). Second, both sets of allegations involve similar conduct occurring during the same time period (threats of plant closure). Third, the amended charges and complaint allegations share common defenses. Thus, without regard to whether another charge encompassing the allegation has been dismissed, we find that under the Board's "closely related" test the allegations of the amended charges are sufficient to support complaint paragraphs 15 and 16.

(d) Complaint paragraph 23(b)

Paragraph 23(b) alleges that about November 15, 1994, and continuing thereafter, the Respondent refused to hire Thressa Hiquet because of her union activities and those of her father. The Respondent contends that charge Case 6–CA–27142 initially alleged that the refusal to hire was based on the union activities of both Hiquet and her father, but that charge was later amended to remove the reference to her father's union activities. Because the reference to Hiquet's father's activities was withdrawn, the Respondent argues that it cannot be alleged in the complaint, citing *Ducane*, supra. We disagree.

First, we find that the amended charge, filed on June 8, 1995, does not supersede the initial charge, filed on March 21, 1995. The amendment changed the date of

the alleged violation,[19] but does not constitute a withdrawal of the allegation concerning Hiquet's father's activities.

Second, even assuming arguendo that the initial charge was superseded, we find that the complaint allegation is closely related to the amended charge which alleged a continuing refusal to hire based on Hiquet's union activities. The amended charge and complaint allegations involve the same section of the Act (Section 8(a)(3)) and the same legal theory (refusal to hire in order to discourage union activities).[20] Both allegations involve the same conduct and the same factual circumstances. In addition, the amended charge and complaint allegation share common defenses (that Hiquet would not have been hired even absent union activity). Thus, without regard to whether the initial charge allegation concerning Hiquet's father's union activities has been withdrawn, we find that under the Board's "closely related" test the allegations of the amended charge are sufficient to support complaint paragraph 23(b).

(e) The judge's "overall effort" theory

The judge rejected the Respondent's Section 10(b) defenses, finding all allegations timely because they emanated from an overall effort by the Respondent to resist unionization. The judge found that a sufficient nexus existed between the charge allegations and the complaint allegations because all the allegations arose from the same factual circumstances involving the Respondent's overall plan to resist unionization. The Respondent argues that the judge's "overall effort" rationale disregards *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990) and *Drug Plastics & Glass Co., v. NLRB*, 44 F.3d 1017 (D.C. Cir. 1995), denying enforcement of 309 NLRB 1306 (1992). We disagree.

Recently in *Ross Stores,* 329 NLRB 573 (1999), the Board responded to the concerns expressed by the *Drug Plastics* Court and clarified Board law. The Board reaffirmed *Nickels Bakery*, supra, and other precedent holding that the requisite factual relationship under the "closely related" test may be based on acts that arise out of the same antiunion campaign. The Board overruled *Nippondenso* to the extent that it held that the factual relationship could not be so based.

More specifically, under the *Nickels Bakery* test, as reaffirmed in *Ross Stores*, the Board and the Courts have found:

> A sufficient relation between the charge and complaint in circumstances involving "acts that are part of the same course of conduct, such as a single campaign against a union," *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970), and acts that are all "part of an overall plan to resist organization." *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973). [296 NLRB at 928, fn. 7.]

Furthermore, the Board will find a sufficient factual relationship "whether or not the acts are of precisely the same kind and whether or not the charge specifically alleges the existence of an overall plan on the part of the employer." *Recycle America*, 308 NLRB 50, 50 fn. 2 (1992).

Applying these principles here, we reject the Respondent's contention that certain complaint allegations are untimely because they are not related to earlier charges and amended charges and find, as discussed below, that all the allegations in this proceeding, including those raised in the Respondent's exceptions, share a significant factual affiliation under the "closely related" test.

The record shows that the second amended charge Case 6–CA–26593, filed on October 31, 1994, alleges, inter alia,

> On or about July 31, 1994, the [Respondent], by its officers, agents and representatives, has, by creating the impression that its employees' union and concerted activities are under surveillance by the employer, *and other acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act*. [Emphasis Added]

The judge found that timely charges and amended charges were filed subsequently in Cases 6–CA–26746, 6–CA–27045, 6–CA–27071–1, 6–CA–27071–3, 6–CA–27128–2, and 6–CA–27142 and contained allegations relating to the union's campaign and the Respondent's various forms of coercive conduct aimed at thwarting the unionization. Thus, the references in the charges and amended charges to the Respondent's acts of interference with the employees' Section 7 rights are closely related to the complaint allegations that the Respondent sought to interfere with employees' organizational rights by, inter alia, threats of plant closure, interrogation, threats of discipline, disparate application of a no-solicitation/no-distribution rule against union supporters, and refusal to hire a suspected union supporter. For this reason, we find that the allegations in the complaint are

[19] The amended charge alleged that the refusal to hire occurred initially about October 26, 1994, and continued thereafter.

[20] See *Crown Cork & Seal Co*., 255 NLRB 14, 42 (1981), holding that "it matters little" whether a refusal to hire was motivated by the union activities of the applicant or the union activities of the applicant's relative. As a matter of law, a violation of Sec. 8(a)(3) has been clearly established in either event. *Copes-Vulcan, Inc.,* 237 NLRB 1253, 1257 (1978), enfd. in pertinent part 611 F.2d 440 (3d Cir. 1979).

connected to the charge allegations because they share similar factual circumstances.[21]

We also are satisfied that under the "closely related" test all the allegations share common legal theories based on the Respondent's animus in opposition to the union's organizational campaign, and that the Respondent raised similar defenses to all the allegations. In addition, we find that the evidence shows that the Respondent had timely notice of all the allegations contained in the complaint and had a sufficient time period to prepare its defense.

Accordingly, for all these reasons, we affirm the judge's finding that complaint allegations 10(b) and (c), 12, 15, 16, and 23(b) are not barred by Section 10(b) of the Act and that, contrary to the Respondent's contention, it was not denied due process.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3(d).

"(d) About mid-February 1995, by Supervisor Jim Donaldson, impliedly threatening employees with discipline if the employees talked about the Union, and threatening more onerous working conditions and plant closure if the Union were selected as the employees' collective-bargaining representative."

2. Substitute the following for Conclusion of Law 3(e).

"(e) Enforcing its no-solicitation/no-distribution rule selectively and disparately applying it only against employees supporting the Union."

3. Delete Conclusions of Law 3(a), (b), and (j) and reletter the remaining paragraphs accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Seton Company, Saxton, Pennsylvania, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Engaging in surveillance and creating an impression among employees that their Union and other protected concerted activities were under surveillance.

(b) Impliedly threatening employees with discipline, including discharge, if the employees talk about the Union.

(c) Coercively interrogating employees about their union membership, activities, and sympathies.

(d) Enforcing its no-solicitation/no-distribution rule selectively and disparately by applying it only against employees supporting the Union.

(e) Threatening its employees with plant closure and more onerous working conditions if the union campaign were successful and/or if the employees select the Union as their representative.

(f) Refusing to hire employees because of their union activities and those of their relatives.

(g) Discharging employees because of their union or other protected concerted activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Lynn Wesley full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer Thressa Hiquet an appropriate position at Seton Company's Saxton, Pennsylvania facility.

(c) Make Lynn Wesley and Thressa Hiquet whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Lynn Wesley and refusal to hire Thressa Hiquet, and within 3 days thereafter, notify them in writing that this has been done and that the discharge and refusal to hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Saxton, Pennsylvania, copies of the attached notice marked "Appendix."[22] Copies of the no-

[21] The judge correctly identified the connection between the allegations of the complaint and the allegations of the charges and amended charges. He stated: "Board precedent makes clear that complaint allegations of coercive acts aimed at thwarting a union campaign may be deemed closely related to—or having a sufficient nexus with—charge allegations of coercive acts in resistance to that campaign. This is so whether the acts are of precisely the same kind and whether the charge specifically alleges the existence of an overall plan on the part of the employer." In addition to the authority cited by the judge, see *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 941–942 fn. 5 (4th Cir. 1995) (distinguishing *Drug Plastics)*.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

tice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT engage in surveillance and create an impression among our employees that their union activities are under surveillance.

WE WILL NOT impliedly threaten our employees with discipline, including discharge, if our employees talk about the Union.

WE WILL NOT coercively interrogate our employees about their union membership, activities and sympathies.

WE WILL NOT enforce our no-solicitation/no-distribution rule selectively and disparately by applying it only against employees supporting the Union.

WE WILL NOT threaten our employees with plant closure or more onerous working conditions, if the union campaign were successful and/or if our employees select the Union as their representative.

WE WILL NOT refuse to hire employees because of their union and other protected concerted activities.

WE WILL NOT discharge employees because they engage in union and other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Lynn Wesley full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Thressa Hiquet an appropriate position at our Saxton, Pennsylvania facility.

WE WILL make Lynn Wesley and Thressa Hiquet whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Lynn Wesley and refusal to hire Thressa Hiquet and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge and refusal to hire will not be used against them in any way.

SETON COMPANY

Kim Siegert and *Suzanne S. Donsky, Esqs.,* for the General Counsel.

Richard J. Delello and *Alan S. Model, Esqs*., of Roseland, New Jersey, for Respondent Employer.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Altoona, Pennsylvania, on April 8–11, 1997, and Bedford, Pennsylvania, on May 12–15, 1997. The charges and amended charges in the involved cases were filed by the Charging Party, United Mine Workers of America, AFL–CIO (the Union), on the dates shown after the charge number of the following Cases: 6–CA–26593, August 4, 1994; amended 6–CA–26593, August 17, 1994; second amended 6–CA–26593, October 31, 1994; 6–CA–26675, September 7, 1994; amended 6–CA–26675, October 31, 1994; 6–CA–26746, October 4, 1994; amended 6–CA–26746, June 7, 1995; 6–CA–26870, November 25, 1994; 6–CA–26927, December 30, 1994; amended 6–CA–26927, June 7, 1995; 6–CA–26962, January 11, 1995; amended 6–CA–26962, June 7, 1995; 6–CA–27045, February 9, 1995; amended 6–CA–27045, June 7, 1995; 6–CA–27071–1, February 22, 1995; amended 6–CA–27071–1, June 7, 1995; 6–CA–27071–2, February 22, 1995; 6–CA–27071–3,

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

February 22, 1995; amended 6–CA–27071–3, June 7, 1995; 6–CA–27128–2, March 15, 1995; amended 6–CA–27128–2, June 8, 1995; 6–CA–27141, March 21, 1995; amended 6–CA–27141, June 7, 1995; 6–CA–27142, March 21, 1995; amended 6–CA–27142, June 7, 1995; 6–CA–27418, July 21, 1995; 6–CA–27469, August 14, 1995; 6–CA–27492, August 14, 1995; amended 6–CA–27492, February 5, 1996; 6–CA–27783, December 15, 1995; and amended 6–CA–27783, February 5, 1996.[1] A consolidated complaint issued on June 9, 1995, and a second order consolidating cases and amended consolidated complaint (complaint) issued February 7, 1995.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Seton Company (Respondent or Seton), a Delaware corporation, engages in the manufacture of leather automobile seat pieces at its facility in Saxton, Pennsylvania. Respondent admits the jurisdictional allegations of the complaint and, I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

Seton Company, a Delaware corporation, with headquarters in Norristown, Pennsylvania, is a manufacturer of cut leather for the automobile industry. Seton operates facilities located in Saxton, Pennsylvania, Newark, New Jersey; Lingdens Ozza, Germany; South Africa; and Hungary. The Newark plant is a tannery where raw hides are tanned and retanned to a base color. At this facility production employees and truckdrivers are represented by a union. When tanned, the hides are trucked to the Saxton facility for cutting and finishing.

Saxton is a small rural Pennsylvania town with a population of about 800–900. The majority of Saxton's residents either work at Seton, have worked at Seton, or have relatives, friends, or neighbors who work at Seton. Seton established its cutting and finishing operation at Saxton in 1974, transferring this function from its Newark, New Jersey plant. Since then, the Seton Saxton facility has become the largest employer in Bedford County, Pennsylvania, employing over a thousand employees at present. In about 1994 a cutting plant operated by Respondent in Toledo, Ohio, was closed and that operation was also transferred to Saxton. The Saxton plant has seen rapid and significant growth. In 1990 Seton employed about 200 production employees. This number grew to about 600 to 700 by the first of 1994. Its customers at that time were General Motors, Ford, Chrysler, Porshe, Mitsubishi, and Nissan. Since 1994 the Saxton facility has continued to grow and Seton has opened new plants in Europe and South Africa.

In about 1993 the UAW attempted to organize the production workers at Seton Saxton, but failed in that attempt. Beginning in or about June 1994 the Union undertook an organizing drive among Respondent's employees in the following described unit:

> All production and maintenance employees employed by the Employer at its Saxton, Pennsylvania facility; excluding all mixing room employees, color matchers, lab technicians, group leaders, technical employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

Rich Trinclisti is an organizer for the Union and, was in charge of the organizing drive at Seton. The campaign began in June, following an earlier meeting with interested Seton employees, that was not well attended. The campaign was instituted following a call to the Union from its Saxton area local president, R. James Hiquet. Hiquet indicated that a number of Seton employees had expressed interest in being represented by a union. Once the campaign started, an in-house employee organizing committee was established, with its members' duties including soliciting authorization cards, calling on the local newspapers, making house calls on employees, passing out union literature, and attempting to spread the Union message in the plant. House calls were made at three periods during the campaign. The first such calls were made around Thanksgiving 1994, the second round occurred in January 1995, and the third in March 1995. Items of clothing with union insignia were made available to employees wanting them and many employees wore such items at the workplace. During the campaign regular meetings with employees were conducted by the Union. Such meetings took place at Hiquet's gym, a small two story building owned by R. James Hiquet's son and daughter. The younger Hiquets operated two small businesses in the first floor and rented the second floor to the Union for use as its headquarters during the campaign.

A petition for representation was filed on September 1, 1994, and an election was scheduled for February 28, 1995. At the request of the Union on February 24 the election was postponed indefinitely. The Respondent has admitted the supervisory and agency status as well as the titles of the following persons during times relevant to these proceedings: Phillip D. Kaltenbacher, chairman of the board; Herman Winkler, vice president; Herbert Winkler, finishing production manager; W. Mark Taylor, manager of human resources; Tim Brennan, plant manager; Brian Rickabaugh, first shift finishing supervisor; Wayne Claar, second shift die shop group leader; Brian Grace, section shift incremental press group leader; Steve Putt, production manager-cutting plant; Gary Oberman, first shift conditioning group leader; Clair Horton, third shift incremental press group leader; Jim Donaldson, die shop supervisor; Tina Detterline, third shift cutting supervisor; Robert White, second shift incremental press group leader; David Richey, second shift cutting supervisor; Jennifer Putt Black, first shift cutting supervisor; Alan Mountain, plant engineer; Keenan Childers, third shift incremental press group leader; Gary Leydig, first shift incremental press group leader; Jim Eichelberger, incremental press group leader; Patty Wise, research and development supervisor, and Michael Clouse, transportation supervisor. Respondent also admitted that Julie Reed was an agent for Respondent with

[1] All dates are in 1994 unless otherwise indicated.

respect to hiring and receipt of phone calls in the human resources office. It admitted that Projections, Inc. was an agent within the meaning of Section 2(13) of the Act with respect to the production of a video shown to Respondent's employees.

The complaint alleges that Respondent violated the Act by:

1. About July 31, by Clair Horton, creating an impression among employees that their union activities were under surveillance.

2. About July 31, posting 24-hour security guards in the parking lot of its facility and by posting the guards, harassed and intimidated its employees in the exercise of Section 7 rights.

3. About September 12, by Tina Detterline, threatening employees with discharge because of their union activity.

4. By Jim Donaldson, at the die shop:

(a) About September 14, impliedly threatening employees with discipline if employees talked about the Union.

(b) About mid-February 1995, interrogating employees about their union membership, activities, and sympathies.

(c) About mid-February 1995, impliedly threatening employees with discipline if the employees talked about the Union.

5. About September and on two occasions in mid-February 1995, by Donaldson at the die shop, enforcing its no-solicitation/no-distribution rule selectively and disparately applying it only against employees supporting the Union.

6. About early January 1995, by Wayne Claar, by telephone, creating an impression among its employees that their union activities were under surveillance.

7. About February 10, 1995, by Projections, Inc., engaging in surveillance of Respondent's employees and creating the impression that their union activities were under surveillance.

8. About February 17, 1995, by Michael Clouse, threatening its employees with plant closure if the union campaign were successful.

9. About February 15, 1995, by Patty Wise, threatening its employees with plant closure if their union campaign were successful.

10. About February 1995, by James Donaldson, in the presence of employees, instructing a supervisor to sign an antiunion petition.

11. About February 21, 1995, by Phillip D. Kaltenbacher, impliedly threatening employees with plant closure if the employees selected the Union as their representative.

12. About February 17, 1995, by Jim Eichelberger, impliedly threatening employees with plant closure if the union campaign was successful.

13. About November 15, and continuing to date, failing and refusing to hire Thressa Hiquet because of her union activities and those of her father.

14. About December 30, discharging its employee Lynn Wesley.

15. About March 17, 1995, discharging its employee Dana Endres.

B. The Alleged Violations of Section 8(a)(1) of the Act

l. Did Respondent violate the Act by placing guards in its parking lot?

On July 22 the Union sent a letter to Respondent advising it of the campaign by the Union to organize its employees. On July 26 Respondent sent a memo to employees noting this effort. On July 30 Mark Taylor, human resources manager, entered into an oral contract with Hennaman Detective Agency to provide one guard per shift for the parking lot and the guards began monitoring the parking lot on July 31. Prior to this date, Respondent had not had any guards in the lot.

The security guards were placed at the plant on Taylor's recommendation. Taylor testified that it was reported to him that employees were being harassed in the parking lot, and that some were afraid to go to their cars at night. Taylor was also receiving some crank calls at home at this time. An employee, Dawn Clark, came to him and personally said she was being harassed. The guards were given written instructions which directed them to watch for, and, report incidents of employee harassment, violence, consumption of alcohol, or illegal substances, and sexual activities.

Taylor testified that employee, Wanda Taylor, complained to him that her car had been vandalized in the parking lot. A similar claim was made by employees Steve and Jennifer Husick. Their car had the letters "UMWA" scratched in the paint on the truck, and "vote yes" scratched on another part, and the convertible top of their car was cut. The documentation on the Wanda Taylor incident reflects a date in August, whereas, the documentation of the Husick incident is dated mid-June 1996.

At the end of July a number of employee supporters of the union organizing activity began soliciting the support of other employees in a variety of ways, including seeking their support and soliciting signatures on authorization cards in the Respondent's parking lot at shift change times. Several employees testified about the effect the placing of the guards in the lot had on these solicitation efforts. The first to do so was Mark White, who has been employed by Seton for 8 years and, in 1994 worked on first shift as a hide marker. White was an initial supporter of the Union, attending the first meeting held in June. He was also a member of the in-house organizing committee. He engaged in the distribution of authorization cards in the Seton parking lot in July. He was assisted in this effort by fellow employees Steve Figard, Dale Wence, and Wes Crooks.

About August 3 White first observed a security guard in the Seton parking lot. He and several other union supporters pulled into the lot to distribute cards to employees coming off the third shift and the guard was there. White testified that different from previous nights, other employees would not talk to him. The guard approached him and the other union supporters and asked if they were Seton employees. They told the guard they were and the guard asked on what shift they worked. They replied the first shift and the guard stood and stared at them for about 15 seconds and walked away. White contends that this questioning of the union supporters deprived them of the opportunity to speak with employees as the employees exited the lot while the questioning was taking place. Further, in his opinion,

employees did not want to talk to them about the Union with the guard in place.

The most guards White ever observed in the lot were two. He never saw a guard take notes, pictures, or ask anyone's name. The guard did not tell them they could not be in the lot. He denied that he or anyone else with whom he distributed cards harassed or intimidated any other employees. He, likewise, never observed any acts of vandalism in the lot.

William Swope Jr. was employed by Seton from October 1992 until he was discharged in February 1995. During his employment, Swope was an incremental press picker. He supported the union campaign and inter alia, engaged in the distribution of authorization cards. Swope was engaged in this activity in the Seton parking lot on July 25–28 between the first and second shifts. During this time he was successful in getting only two cards accepted by employees. On one of these days, he saw group leader and, admitted supervisor, Keenan Childers, observing his activity. Swope testified that he would stand near the entrance to the plant and as employees passed, offered them a card. If they asked a question, he would suggest they attend a union meeting at Hiquet's gym. Beginning the first week of August he first observed a security guard in the parking lot. Swope stopped soliciting cards in the lot at this time because he felt intimidated by the guard. According to Swope, he was driving to the plant to solicit third shift employees leaving the plant and first shift employees coming on. As he approached the main gate he observed two employees across the road from the main entrance attempting to get employees, presumably in their cars, to take cards. Swope observed the guards walking to the edge of Seton property to observe this activity. He testified that the guards had notebooks with them. No other witness testified that the guards had notebooks and I do not credit this testimony. This incident, if it occurred at all, happened at shift change, and, I do not find the guards activity to be unusual since solicitation at the plant entrance could have an effect on the ability of employees to leave and enter the plant. After the guards were put in the lot, Swope heard that they had been hired because of vandalism in the lot.

William Swope Sr. has been employed by Seton for 22 years, and, at the time of the hearing was a trainer on inactive status. In 1994 he was employed as an incremental press team member on first shift. Swope Sr. supported the Union and testified on direct that he passed out authorization cards in the Seton parking lot beginning the third week of July. Beginning in the first week of August, he observed one security guard per shift in the Seton lot. According to Swope Sr. these guards would pay close attention to employees who grouped together in the lot. He cited an instance on August 4 when he and two other employees were talking in the lot and the guard began moving toward them, as if he were trying to hear what they were saying. The employees became intimidated and broke up and went to their cars. According to Swope Sr. the guard continued to watch him until he completely exited the lot. On cross-examination Swope Sr. admitted he never actually attempted to pass out cards in the lot. On one occasion, another employee asked him for some cards and he told that employee he had some cards in his automobile in the parking lot and gave the employee directions to where his car was parked.

Employee Lynn Wesley testified that she solicited employees to sign authorization cards, successfully getting 30 to 40 cards signed. These solicitations took place in the Seton parking lot from July through November. She testified that after the posting of the guards her conversations with employees were cut short because, in her opinion, the presence of the guards intimidated employees from talking with people who were openly in support of the Union.

Employee Glenn Leavelle testified that he passed out authorization cards in the parking lot without the guards giving him any trouble.

The General Counsel makes no argument that the guards engaged in unlawful surveillance and relies instead on the argument that the guards' very presence in the lot reasonably tended to coerce employees in the exercise of Section 7 rights and, therefore, violated Section 8(a)(1) of the Act. In the two cases cited by the General Counsel, *Mediplex of Whethersfield*, 320 NLRB 510 (1995), and *Shrewsbury Nursing Home,* 227 NLRB 47 (1976), the guards in question took some affirmative action to interfere with protected activity. In *Mediplex of Whethersfield,* the guards would not let cars coming into the facility stop to allow the driver to talk with a union organizer. They also apparently took the license number of cars attempting to stop and have some contact with the organizers. In *Shrewsbury,* an armed guard resembling a police officer was placed at the entrance to the involved facility at the outset of organizing and reported the arrival of any organizer to the Respondent's management. The owner of the Respondent would then join the guard and watch the activities of the organizer. The Board found that this constituted unlawful surveillance, no other credible reason being advanced for the guard's presence. As noted, unlawful surveillance is not urged here, and, based on the rationale set out in *Springfield Hospital,* 281 NLRB 643 (1986), I would not so find even if that theory was advanced.

The General Counsel urges that the only reason the guards were hired was in response to the onset of the organizing campaign. Taylor testified without much specificity that he had received phone calls of a harassing nature and at least one employee had complained of harassment in the lot prior to the placement of the guards. Had the guards actually taken any action other than by merely being in the lot, that interfered with the organizers solicitation, I would be inclined to find this testimony pretextual. However, only one guard per shift was posted and the guards did virtually nothing to hinder the actions of the organizers. White and Swope testified they felt intimidated and stopped soliciting, yet, Wesley and Leavelle continued to solicit with Leavelle affirmatively stating that the guards did not bother him. Further support for the Respondent's position in this matter is founded in the documented fact that some vandalism did occur shortly after the guards were posted. I cite this evidence only to show that Respondent's stated concern was not totally without foundation. Moreover, as will be discussed in a later section of this Decision, Respondent allowed the distribution of union material in the plant and did nothing to discourage employees who wore prounion clothing from doing so. In the absence of any showing of an overt attempt to thwart the Union from getting its message to employees and in the absence of a showing that the guards engaged in any activity

that could be rationally seen as interfering with Section 7 rights, other than by their mere presence, I will recommend this complaint allegation be dismissed.

2. Did Respondent unlawfully, selectively, and disparately enforce its no-solicitation/no-distribution rule?

Respondent maintained a no-solicitation/no-distribution rule at its Saxton facility at the time the union organizing campaign began. The rule, set forth below, prohibits both solicitation and distribution at its facility, during working hours, and at anytime in work areas:

> NO-SOLICITATION/NO-DISTRIBUTION
>
> SETON PROHIBITS SOLICITATION AND DISTRIBUTION BY ANY EMPLOYEE DURING WORKING TIME. DISTRIBUTION IN WORK AREAS IS STRICTLY PROHIBITED AT ANY TIME ON SETON PREMISES.
>
> DISTRIBUTION INCLUDES FLYERS, LEAFLETS, ADVERTISEMENTS OR CARDS FOR ANY PURPOSE. NO NOTICE MY BE POSTED ON SETON'S PREMISES WITHOUT THE PRIOR WRITTEN AUTHORIZATION OF THE HUMAN RESOURCES MANAGER.
>
> IN ORDER TO COMPLY WITH ESTABLISHED LAW, SETON MUST STRICTLY ADHERE TO UNIFORMLY ENFORCING ITS NO-SOLICITATION/NO-DISTRIBUTION GUIDELINES.

On September 9 employee Mark White and three other union supporters went to the office of human resources manager, Mark Taylor, and asked for permission to post union literature on bulletin boards and distribute literature at work. Taylor said he did not have an answer for them, but would get one and get back to them. On September 15 Taylor gave them a memo he had written that gives permission to post literature on the employee lunchroom bulletin board and distribute literature in that room. It prohibits the distribution of literature during working times and in work areas. The memo states that this is the policy it follows for all nonwork related distributions.

In January 1995, White was working overtime in the finishing plant. He observed Supervisor Steve Putt handing out Vote No hats to other hide markers on worktime in the workplace. On the same day he observed another employee passing out antiunion T-shirts on worktime in the workplace. In February he observed an employee, Chris Rankin, with a box of antiunion clothing and insignia at his workstation. He saw Jennifer Black get some of this material from the box and take it to the workstation of another employee, Sandy Dotson, and put the material under her worktable. Later, other employees came to Dotson's workstation and took some of the items. All of these events took place on worktime. Black testified that she saw procompany hats, T-shirts, and other insignia in the plant, saying they just appeared. She has seen them in boxes on the plant floor. She denied any role in taking these items out on the production floor. As this denial flies in the face of overwhelming evidence on this point, I discredit it.

Glenn Leavelle became a Seton employee on July 10, 1989, and is still employed. He works in the maintenance department under the supervision of Ron Horton. Prior to working in maintenance he worked in the die department under the supervision of Jim Donaldson. In 1994 he was working in the die shop on first shift. When the union campaign began, he supported it, signed an authorization card, and started wearing a hat with union insignia to work. He was on the in-house committee and made house calls on other employees to solicit support for the campaign. He attended all union meetings held at Hiquet's gym. He also wrote a letter to the local paper supporting the union efforts which the paper published. In mid-September after taking some templates he had made to the office, he was returning to the die shop and stopped to discuss a die problem with a production employee. About 15 minutes later, Donaldson came to him and told him that when he goes on to the production floor to not stop and talk to anyone or ask any questions, especially about the Union. Donaldson also accused him of holding up the work of another employee. Prior to this he had never been told not to talk with other employees nor did he know of any company policy in this regard. He testified that talking with other employees about die problems was common.

Donaldson testified that the die shop employees had occasion to leave the die shop and go on the production floor to take out dies or pick up damaged dies or dies that needed sharpening. Donaldson testified that he had instructed the employees to minimize contact with employees on the floor and further instructed them not to disrupt employees on the floor by speaking with them. He denied ever instructing them not to speak about the Union while out on the floor. In response to the specific allegations of Leavelle Donaldson testified that at one point in 1994 he was advised by supervisor, Jennifer Black, that Leavelle had been on coffeebreak and while returning from break, stopped and talked with some production employees. Donaldson confronted Leavelle with this information and Leavelle said the employees had called him over. Donaldson denied telling Leavelle anything about the Union in regard to this incident. Supervisor Black could not recall having any part in this incident. I fully credit Leavelle's testimony in this regard. Not only was he visibly a more credible witness, Donaldson's testimony on another issue was contradicted by at least two other credible witnesses.

In mid-February 1995 Leavelle and another die shop employee were talking about a work-related problem. When the other employee left Donaldson came to Leavelle and asked if they had been talking about the Union. Leavelle said they had not. Donaldson warned that if he got caught talking about the Union he could be fired. Sometime later in February Leavelle overheard part of a conversation between Donaldson and two other die shop employees. Specifically, he heard Donaldson say, "If this Union comes in and the wages go up, this plant will shut down." Then Donaldson said, "If this Union comes in this plant, it's going to be shitty back here."

Donaldson admitted observing Leavelle and Anthony Lane engaged in a conversation at shift change time in mid-February. He denied overhearing the substance of their conversation or speaking with Leavelle about the conversation. He denies threatening Leavelle with discipline or termination if he were caught talking about the Union. He denied telling the other die shop employees that if the Union came in and wages went up the plant would close. He denied telling employees that things would get shitty if the Union came in. For the reasons set forth

above, I credit the testimony of Leavelle in this regard and discredit that of Donaldson, including his denials.

Phyllis Colledge has been employed by Seton for 4 years as an incremental press operator. In December her supervisor was Bob White. Around the first of February 1995 she observed a coemployee, Donna Lowe, passing out antiunion T-shirts, hats, and badges in the workplace on worktime. She specifically observed Lowe give another employee, Tom Rampert, each of these items. While this was occurring supervisors White and Dave Ritchey observed, and, did not stop the activity. The employees Lowe gave the material to went to the bathroom and put them on. These employees included Rampert, Lance Reed, Carla Ramsey, and Connie Reed. Lowe offered Colledge some of the antiunion material, but Colledge refused it. The employees were not on breaktime when Lowe distributed the items to them. Colledge knew that the antiunion items being distributed by Lowe had actually originated in the human resources department, as she had been present in the lunchroom with Lowe before work that day when Lowe learned that the items were ready for distribution. Colledge overheard Lowe speaking over the phone in the breakroom, saying, "Are they in? Okay, I'll go get them." When Lowe hung up the phone, Colledge heard employee Darrell Richards ask Lowe, "Was that Julie again?"[2] Lowe replied, "Yes, the stuff is in. I've got to pick them up in the office." It was when Colledge next saw Lowe at her station that she was carrying the box containing the antiunion material. Supervisors Richey and White both testified. White did not remember giving Lowe procompany materials nor did he remember seeing employees taking such items and going to the restroom to put them on. On the other hand, Richey testified that he received such items in boxes from the human resources department and placed the boxes in the middle of the plant near press number five, then walked away. He testified that he understood the rules to be that company material could be distributed on the floor, whereas, prounion material distribution was confined to the cafeteria. I credit the testimony of Colledge over the lack of memory on the part of these supervisors.

On February 23 Colledge observed Lowe talking about and against the Union with another employee for 15 to 20 minutes in the workplace on worktime. According to Colledge, this conversation was observed by Ritchey and White who did nothing to stop it. Lowe did not testify. I fully credit Colledge's testimony. Contrast this leniency with the threat to Leavelle by Supervisor Donaldson with respect to talking about the Union positively.

Scott Reed, a material handler, who served on the union's in-house organizing committee, also observed distribution of antiunion materials on the work floor during work hours. According to Reed it was on about February 14, 1995, at around 12:30 p.m. when he saw two spray line operators, Norma Schooley and Hayden Birksheimer, passing out Vote No T-shirts to fellow workers. Reed was returning from lunch when he saw these employees standing by the staker/duster machine and handing out the shirts to fellow employees. Reed observed several employees take the shirts. Some of the employees put the shirts on immediately and others took them with them.

Respondent also allowed the circulation of antiunion petitions in work areas in the plant during work hours. According to Julie Reed, antiunion petition General Counsel Exhibit 110 was "generated through our office (Human Resources) personnel." Employee Melinda Brown similarly asserted at hearing that she signed antiunion petition General Counsel Exhibit 108 because "They were talking to us through the office." Supervisor Keenan Childers received the antiunion petition he signed from an employee "out on the production floor." Supervisor Jim Donaldson admittedly participated in the circulation of one of the antiunion petitions in a work area. Donaldson found the document lying on a table in a work area, took it to his office and placed it on his desk. He then invited the employees under his supervision to sign the document if they wanted. Donaldson later returned the document to a table in a work area where other employees and supervisors would have access to it. In Donaldson's presence, several employees solicited employees under Donaldson's supervisor to sign an antiunion petition in the die shop in February 1995.

Based on the substantial credible evidence as set out above, I find that Respondent knowingly allowed its employees to solicit support for the Company by talking against the Union, distributing and allowing employees to distribute antiunion petitions for employee signatures and distributing and allowing employees to distribute items indicating support for the Company in work areas on worktime. While allowing such activity in support of its position, it strictly enforced its no-distribution/no-solicitation rule with respect to activities by employees on behalf of the Union. Such disparate enforcement of the rule violates Section 8(a)(1) of the Act. *Opryland Hotel,* 323 NLRB 723 (1997); *Eaton Corp.,* 302 NLRB 410, 413 (1991).

3. Did Respondent violate the Act by Supervisor Donaldson's direction to Supervisor Claar to sign an antiunion petition in the presence of employees?

Anthony Lane was employed by Seton in its die shop from 1992 until March 1995. On a workday in late February 1995 when he reported for work there were some female employees in the die shop circulating an antiunion petition. Lane was asked to sign the petition to "have the United Mine Workers withdraw from organizing." Lane glanced at the document and saw the signature of several of the die shop employees and the die shop supervisor, Jim Donaldson. Lane declined to sign the petition. Supervisors Donaldson and Wayne Claar were standing about 5 feet away from him at this point. After Lane declined to sign, Donaldson turned to Claar and said, "You will sign this." Lane testified that Claar then signed the petition which he had been solicited to sign in the presence of other die shop employees. Claar testified that in February 1995 in front of employees, Donaldson came to him with an antiunion petition and told him to sign it. He did so and noted the petition had been signed by two die shop employees, Jason Hollingshead and Art Blades, as well as Donaldson.

Donaldson unconvincingly denied this testimony by Lane and Claar. I credit their testimony and discredit that of Donaldson. However, I do not find that Donaldson's actions in

[2] "Julie" is a reference to Julie Reed, Lowe's sister, and Respondent's admitted agent in the human resources department.

this regard violated the Act. The General Counsel acknowledges that Respondent's supervisors may generally give each other directives about most matters without running afoul of the Act. It is contended however, that Donaldson's actions with respect to Claar are distinguishable because employees were present when Donaldson demanded Claar sign the petition. In support of the position, the General Counsel cites the case of *Wisconsin Steel Industries,* 318 NLRB 212 (1995), where the Board found a violation of the Act where one supervisor, in the presence of employees, shouted to another supervisor that the involved respondent would shutdown the plant and move if the union were voted in. Clearly the threat to close the plant violated the Act when it was communicated to employees. However, there was nothing inherently unlawful about a supervisor signing an antiunion petition nor to my mind being directed to do so by another supervisor. I recommend that this complaint allegation be dismissed.

4. Did Respondent unlawfully engage in surveillance or give the impression of surveillance of its employees' union activity?

a. The Clair Horton incident

Edward Hess was employed by Seton from January 1993 until May 1995 working as an incremental press operator. He worked on third shift under the supervision of Clair Horton. He supported the union organizing campaign, signing an authorization card, and attending meetings at Hiquet's Gym. On July 31 he drove to a scheduled union meeting at the gym, arriving at the same time as a fellow employee Jim Willis. The two parked their vehicles directly across the street from the gym. Following the meeting Hess reported to work. He was working with Willis when Horton approached and asked Willis if he had been out for a joy ride the day before.[3] Willis inquired what he meant and Horton said that he had seen Willis's vehicle in Saxton. Horton had been in Saxton obtaining a hunting license. Hess asked if Horton had seen his car and Horton said no. Willis identified his vehicle and Horton remembered seeing it as well. Hess then asked why Horton did not stop in (in the gym) for donuts and coffee. Horton replied that he was not allowed to go in there. Hess responded that Horton should have honked and someone would have brought them out to him. Hess's affidavit to the Board indicates he told Horton in July that he supported the union effort. Horton did not testify. I fully credit the testimony of Hess in this regard.

b. The Wayne Claar incident

Donald Frederick was employed by Seton from March 1991 until he was terminated in March 1995. During his employment he worked in the die shop. During his employment in 1995 the second shift supervisor in the die shop was Wayne Claar. Claar was not Frederick's supervisor. In early January 1995 Claar called Frederick on the telephone. After some general conversation Claar told him to be careful if he went to Hiquet's gym because Seton noted at all times who was coming in and out. In 1995 Frederick had known Claar for about 12 years. Frederick admitted he was "disgusted" with the Company based on his termination. He testified that conversations with Claar on the phone were commonplace.

Wayne Claar was employed by Seton from January 1993 until October 1995 as group leader in the die shop. This is an admitted supervisory position. Claar testified about the phone conversation with Frederick. According to Claar, Frederick, and Claar's brother were longtime friends, and he and Frederick spoke frequently. During the conversation Frederick said he had heard that someone was watching the union hall in Saxton. Claar responded that he also had heard that management was watching the hall, mentioning supervisor, Jim Eichelberger, by name. He said Eichelberger was driving by the hall when meetings were held. Claar's information in this regard was given to him by employees and he had no direct knowledge of its truthfulness. Claar added that he should be careful and watch himself.

I find that the actions of Supervisors Horton and Claar both violate Section 8(a)(1) of the Act as the statements of each supervisor clearly create the impression that employees' union activities are under surveillance by management. *United Charter Service,* 306 NLRB 150, 161 (1992). The applicable test is whether "employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." Id at 150, citing *South Shore Hospital,* 229 NLRB 363 (1977). Respondent's contentions that Hess's admission to Horton that he supported the Union absolves Respondent of the unlawful statement is incorrect. Whether Hess supported the Union or not does nothing to change the fact that Horton created the clear impression that employees' union activities were under surveillance. In any event the union sympathies of employee Willis were not shown to be known to Horton. In the same manner the apparent friendship between Claar and Frederick does not make lawful the clearly unlawful statement that management was watching the gym where union meetings were held. If anything, such friendship would only add to the weight of the impression that surveillance of employees' union activities was being made by management. See *Southwire Co.,* 282 NLRB 916, 918 (1987); *Trover Clinic,* 280 NLRB 6 fn. 1 (1986); *Hanes Hosiery,* 219 NLRB 338 (1975).

c. The Projections, Inc. incident

Thressa Hiquet is the daughter of R. James Hiquet, president of the Local Union. She and her brother owned what is called Hiquet's Gym at all times material to this proceeding. In this building they operated two small businesses, Hiquet's Health and Fitness Club and Slimmer Trimmer You.[4] The involved building had two floors with the businesses only occupying the first floor. During the campaign the Hiquets leased the second floor to the Union for use as its headquarters in the campaign. This use of Hiquet's Gym was well known as the town of Saxton has only about 850 citizens. During the time frame involved, Hiquet spent some part of each day in the building, helping with the businesses.

On February 15, 1995, Hiquet was working at the gym and looked out and observed a man videotaping the building from across the street. At the time of the videotaping union organ-

[3] The third shift spans 2 days and in this case, the day before would have been the daytime of July 31.

[4] The building was sold in 1996.

izer, Rich Trinclisti, Wesley, and an employee named May were upstairs doing organizing work. Hiquet went out to the street and yelled, "Hey pal, what the hell do you think you're doing." The man who was videotaping immediately got in the van and drove away.[5]

Mark Taylor testified that Respondent contracted with a company which produces videos, Projections, Inc., to produce a procompany video to be shown to employees. The script was prepared by several people including Respondent's labor law counsel. William Upchurch is a videographer subcontracted to Projections, Inc. He was assigned by that Company to make videotapes of the plant and its employees for use in a video that it was making for Seton. He took about 4 or 5 hours of unedited tape of these subjects. He was directed by Seton's labor counsel to take a photo of Hiquet's Gym for use in the video. On the last day of taping Upchurch, his assistant, and a company employee went to Saxton and parked in a drive across from the gym, facing it. Upchurch opened the door to the van they were in, stood up and took a 5-to-10 second shot of the gym. Almost immediately a woman, Thressa Hiquet, came out of the gym and began screaming at them.[6] Two men followed her out and got in their pickup trucks and drove off. Upchurch and his crew promptly left the scene. The crew had not sought permission of the gym's owners before filming.

In the procompany video produced by Projections, Inc., the script for the video called for a shot of Hiquet's Gym to show while the narrator notes that the Local Union only collected about $3000 in dues in the last year, but would collect about $400,000 in dues if Seton was unionized, implying that money was the cause for the Union's interest in Seton employees. This shot appears in the video for 1 or 2 seconds. The video was distributed to all employees.

Respondent did not notify Thressa Hiquet or the Union that it planned to videotape the gym where constant union activities were taking place. It did not seek the permission of the owner of the gym to take the videotape. Respondent was fully aware of the use the Union was making of the gym, as it used the picture of the gym to symbolize the union activity in the video it distributed. By its actions in so videotaping the gym and using this segment in the antiunion video, Respondent created the impression of surveillance and did engage in actual surveillance, albeit for a very short time, thanks to Thressa Hiquet's actions in response to the surveillance. That the videotaping took only a short time is a fact that was unknown to employees who watched the antiunion video. I find that Respondent's action in this regard violates Section 8(a)(1) of the Act as it has the ability to intimidate. Had Respondent been interested in minimizing the effects of its videotaping, it could easily have sought permission of Hiquet to videotape the gym, or at the very least given notice to her or the Union that such videotaping was going to take place. See *F. W. Woolworth Co.,* 310 NLRB 1197 (1993); *Waco, Inc.,* 273 NLRB 746 (1984).

[5] There was a great deal of testimony about how the man's identity was discovered, all of which is moot in my opinion as Respondent produced the person and he verified that he had videotaped the building on the date Hiquet recalled.

[6] Upchurch was at the time unaware of her identity.

5. Did Respondent unlawfully threaten and interrogate employees by the actions of its Supervisor Donaldson?

As noted earlier in the section of this decision regarding disparate enforcement of the Company's no-solicitation/no-distribution rule, in mid-September after taking some templates he had made to the office, die shop employee, Glenn Leavelle, was returning to the die shop and stopped to discuss a die problem with a production employee. About 15 minutes later Donaldson came to him and told him when he goes on to the production floor to not stop and talk to anyone or ask any questions, especially about the Union. Donaldson also accused him of holding up the work of another employee. Prior to this he had never been told not to talk with other employees nor did he know of any company policy in this regard. He testified that talking with other employees about die problems was common.

Also, as noted earlier, in mid-February 1995 he and another die shop employee were talking about a work-related problem. When the other employee left Donaldson came to Leavelle and asked if they had been talking about the Union. Leavelle said they had not. Donaldson warned that if he got caught talking about the Union, he could be fired. Sometime later in February Leavelle overheard part of a conversation between Donaldson and two other die shop employees. Specifically, he heard Donaldson say, "If this union comes in and the wages go up, this plant will shut down." Then Donaldson said, "If this union comes in this plant, it's going to be shitty back here." For all the reasons set forth earlier in this decision, I credit Leavelle's testimony and discredit that of Donaldson to the extent that it contradicts that of Leavelle.

I have earlier found that Donaldson's directive to Leavelle not to talk about the Union in the workplace constitutes disparate treatment by Respondent as it allowed employees who were against the Union to spread their message to other employee in the workplace on worktime. I further find from the evidence above that Respondent threatened Leavelle with discharge for engaging in activity it allowed from employees who opposed the Union and further threatened Leavelle with more onerous working conditions and the possibility of plant closure in the event the Union were selected to be the representative of the employees. Such threats are clearly coercive, even to a known union supporter such as Leavelle. As such, they violate Section 8(a)(1) of the Act. *Borg-Warner Corp.,* 229 NLRB 1149 (1977).

6. Did Respondent unlawfully threaten to close the plant?

a. The Patty Wise incident

Scott Reed began work for Seton in July 1994 and currently works there. He works first shift in the finishing department. He reports to Rich Keefman who in turn reports to Ron Richabaugh. Reed supported the organizing effort and wore a union T-shirt to work. At work on February 15, 1995, he overheard supervisor, Patty Wise, tell some other employees that if the Union came in the Company would slowly move out, adding her husband was screwed by the Union.

Debra Lou Fisher testified about a conversation she had with supervisor, Patty Wise, during the campaign. Wise came to Fisher's workstation and Fisher asked for Wise' opinion about the Union. Wise told her that her husband had been a coal

miner and a member of the Union and that it had never done anything for him. Other than their work relationship as employee-supervisor, the two involved individuals have no relationship.

Patricia Wise testified that she remembered talking with Fisher and another employee, Sonny Schwab, about the Union. She remembers one of the employees asking if the Company would move if the Union came in. She responded by telling them that her husband had been a coal miner and had worked at two mines where he was told he would be a lifetime employee and both companies closed within a few years. She told them there had been strikes there involving the Union and she feared for her job if the Union were voted in. She acknowledged that Scott Reed passed by as this conversation took place. She also acknowledged that prior to this conversation, she had been instructed by management not to engage in such conversations.

I credit Reed's testimony in this regard. The other versions of the conversation are essentially similar, but to the extent they conflict with Reed's, I credit Reed's. To the extent that it is argued that Wise was merely giving a personal opinion about what she believed would happen if the Union were voted in, I cannot find that Reed had any notice of this disclaimer. Crediting Reed's version what he heard, I find a clear threat of plant closure, one clearly coercive and intimidating. There was no showing that Wise based her prediction on any objective economic or other factors which were communicated to the employees. Accordingly, I find that Respondent has violated the Act as alleged in the complaint. Wise herself admitted she had crossed the boundary between permissible an impermissible conversations with employees. See *Wis-Pak Foods,* 319 NLRB 933 (1995).

b. The Michael Clouse incident

Material handler and union supporter Scott Reed testified that in mid-February 1995[7] he was unloading dies at the Respondent's dock when transportation supervisor, Michael Clouse, approached him and began talking about the Union. Clouse testified that Reed was wearing a union hat that day. According to Reed, Clouse told him that the Respondent's Toledo, Ohio plant had shutdown and that if the Union came in Respondent could have the plant shutdown in 3 days.

Clouse denied having a conversation with Scott Reed on February 17, 1995, and proved that he was not at the plant on that date. Further, he denied having a conversation with Reed about the Union and specifically denied telling any employee that the Toledo plant was shutdown and they could have shut it down in 3 days and could do that at Saxton. Clouse was opposed to the Union and signed at least two antiunion petitions, though he disclaimed any knowledge of doing so until shown the petitions with his signature on them.

In the face of a clear credibility gap, I believe Reed to be the more truthful witness based on demeanor and Clouse's reluctance to admit signing antiunion petitions. That Clouse proved he was not at the plant on February 17, 1995, is not determinative of whether the conversation took place. He was admittedly at the plant the day before and the week following February 17, 1995. I believe Reed's testimony and find it to be fact. Accordingly, as Clouse's prediction of plant closure was not shown to be based on any objective factors, I find that it constitutes an unlawful threat in violation of Section 8(a)(1) of the Act. See *Jennmar Corp. of Utah,* 301 NLRB 623, 629 (1991).

c. The Phillip Kaltenbacher speech

Phillip Kaltenbacher is chairman of the board and CEO of Seton. On February 21, 1995, at an employee meeting with mandatory attendance, he gave a speech to employees, 1 week prior to the scheduled NLRB election. It was very unusual for Kaltenbacher to visit the Saxton facility, as he had only visited it twice before. One such visit was in 1993 when he presented a check to the local chamber of commerce. The other visit was to make a similar speech to employees during a 1993 organizing campaign by the UAW.

On February 21, 1995, as he began his speech, Kaltenbacher noted that he was "part of a small group that got the idea we ought to come here (to Saxton) back in 1973–1974." Kaltenbacher also referred to an impending announcement by the Company, saying he would make it later because "I want to build up the tension a little bit." Then he began his speech, which, in pertinent part is as follows:

> And its been great to be welcomed at Saxton since I was part of a small group that got the idea that we ought to come here back in 1973–1974. It's hard for me to believe that I've been at this with Seton Company for about a third of a century. And my family has been with this Company. My grandfather helped found it. We've been at it 90 years. And I have to tell you today what I'm going to tell you today has some meat to it and when you get to the meat you'll know why this is one of the most satisfying and important and happy days in my business life. And I think when I get to that point you'll see why it's going to be a huge plus for all of you too. And I'm not going to make that announcement right now. I want to build up the tension a little bit. But the last time I was here speaking to everybody was June, 1993. And we went through how we came here in the early 70's. That we had a cutting plant in Newark, a small operation. And it was us versus them. It was a lousy attitude. And we decided we just had to move. And we abandoned millions of dollars of facilities. Many, many people lost their jobs. And we went on a huge search all over the east. Places like Holland, Michigan, Dowasiak, Michigan and lots of places in Pennsylvania. We came here after a huge, huge search. And we were worried. Everything looked so great, but we said to Olin Horton, the Mayor, who really had a lot to do with this. We said, you know it's great now, you're romancing us, but after we get married is it going to be the same. And he said to me the workforce and the people in this town will never let you down. And one of the things I want to tell you today is you haven't. We came here, we talked about fifty people. We were stretching a little. We started with 25 and we said things get good, we could get up to 50. Things got real good. We expanded some more. More cutting. Then, as you know, we made a decision to close finishing in Newark. Finishing came here. More people lost their jobs. More jobs were created

[7] The complaint alleges that the involved date was about February 17, 1995.

> here. We closed Toledo, which was a cutting facility. We're now 900 people in the workforce. And we've been able to do this through the years together without any outsiders helping us. And when we talked back in June, 1993, we talked about the three legged stool. The thing that makes this Company work. And it's a really tough world out there. There are people competing with us in the United States and all over the world. But why do we work. It's Saxton. It's the Company. It's all of you. It's a three legged stool. And when those legs are firm, we're awesome and we can beat the world. And we've been doing it lately. I left here in June 1993 with a vision that I wanted to take a terrific situation and make it even better and to cement relations to ensure things would be good and that this Company would survive and be in a good position well past my working life, which is about to end in the next decade anyway. And the vision was to bring all of you in as partners, as owners. And we have been working on this vision since shortly after I was here that time in June 1993.

Kaltenbacher then went on to announce that Seton was establishing an employee stock ownership plan (ESOP), which would be available to employees at Saxton.[8] Three times during the speech, Kaltenbacher referred to having developed the ESOP "vision" after his 1993 visit to the facility (for the UAW organizing campaign), once noting, "And remember, this was started after that nice warm reception I got in 1993." As Kaltenbacher concluded his speech, he stated that while he would not dwell on the fact that they were "on the eve of a union election . . . it's pretty obvious and . . . we don't need these outsiders."

It is undisputed that when the Saxton employees heard Kaltenbacher's speech, they knew that the Newark workers to whom Kaltenbacher referred had been unionized. Further, during its 1994–1995 campaign, Respondent distributed literature to its employees which featured language similar to that which Kaltenbacher used in his speech. Thus, for example, in two separate letters from plant manager, Tim Brennan, to the workforce, Respondent repeatedly posed the question, "Is it gonna be us or them?"

I find it clear that CEO Kaltenbacher, in his speech, issued an implied threat that Respondent would close the plant if the employees selected the Union as their representative. Specifically, by telling the gathered employees that Respondent had "abandoned millions of dollars of facilities" at its Newark, location where there was a "lousy attitude," and that "many, many people lost their jobs" there, Kaltenbacher sent a clear message to the employees that Respondent would remove part or all of the Saxton facility if the employees adopted the "us versus them" attitude of unionization. Respondent's conduct in this regard was violative of Section 8(a)(1) of the Act for it is established law that an employer may not threaten to close a plant because of its employees' union activities. See *Douglas & Lomason Co.,* 304 NLRB 322 (1991); *Pacesetter Corp.,* 307 NLRB 514 (1992).

Such threats need not be expressly stated in order to violate the Act. Rather, the Board has held that implied threats to close or move a plant are violative, too, if they would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Mediplex of Danbury,* 314 NLRB 470 (1994); *Russell Stover Candies,* 221 NLRB 441 (1975). Indeed, at the U.S. Supreme Court held in its seminal case concerning this issue, *NLRB v. Gissel Packing Co.,* 395 US 575 (1969), when analyzing coercive nature of implied threats one must recognize the "economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 395 at 617.

Whether implied or expressly stated, the Board has held that an employer's threat to close a plant is all the more coercive when the threat issues, as here, from the mouth of the highest level management official. *Dlubak Corp.,* 307 NLRB 1138, 1146 (1992), citing *Impact Industries,* 285 NLRB 5, 6 (1987). It is undisputed that Kaltenbacher, the most powerful person in Respondent's hierarchy, had only visited the Saxton facility on one occasion prior to February 1995 during the UAW campaign. Thus, Kaltenbacher's very presence in the plant was cause for pause among the employees. When Kaltenbacher then advised the employees that "we abandoned millions of dollars of facilities," in Newark and moved the operations to Saxton, the employees logically understood that Kaltenbacher held sufficient authority to carry out the same type of move from Saxton to another of Respondent's locations, should the employees choose the Union.

The Board has held that employer's statements in circumstances similar to those at hand reasonably tended to interfere with employees' rights. See *Douglas & Lomason,* supra*; MK Railway Corp.,* 319 NLRB 337 (1995). The well settled inquiry for evaluating Kaltenbacher's implied threat of plant closure, as set forth in *Gissel Packing,* supra, is "whether the employer's statement constitutes an unlawful threat of retaliation in response to protected activity, or a lawful, fact-based prediction of economic consequences beyond the employer's control." *Mediplex of Danbury,* supra at 589, citing *Gissel Packing,* supra at 617–619. Kaltenbacher's remarks implying that Respondent would close or move the Saxton plant as it had done with portions of the Newark plant, were in no manner fact-based predictions of the likely economic consequences beyond its control that unionization might have on its continued operation in Saxton. In this regard Kaltenbacher neither explained nor suggested that it had moved the finishing and cutting plants from Newark for any reason other than its employees' "us versus them, "lousy attitudes."

Not only did Kaltenbacher fail to offer any objective facts regarding economic considerations as the basis for his threats, he went so far as to imply that such economic consequences did not matter to Respondent. More particularly Kaltenbacher advised the employees that it had actually "abandoned millions of dollars of facilities," causing "many, many" people to lose their jobs. Nowhere in these statements is there even a hint that possible plant closure at the Saxton facility would be caused by economic factors beyond the control of Respondent, as required

[8] In the days following the speech a number of meetings were held with employees to explain the ESOP in detail. In these meetings nothing was said to explain what Kaltenbacher meant in the portion of his speech set out above.

by the *Gissel* standard. Respondent's message in this regard is abundantly clear, it was willing to go to great lengths to leave behind the "us versus them" attitude of unionization at Newark, even to the point of intentionally losing millions of dollars to do so.

Respondent has cited *Action Mining,* 318 NLRB 652 (1995), in support of its position that Kaltenbacher's speech did not violate the Act. I believe that case is distinguishable, though application of that holding to the instant facts still compels a finding of a violation. First, it must be noted that the Board's initial focus in *Action Mining* was whether the employer in that matter was successful in disavowing certain unlawful conduct it engaged in during the early stages of its antiunion campaign. Finding that the employer had, in fact, effectively repudiated its first several unfair labor practices by posting an unambiguous notice, the Board went on to consider postdisavowal allegations, including a threat of loss of customers issued to employees by the company's president. Specifically, *Action Mining's* president delivered a speech to the assembled employees in which he described how a strike or fear of a strike, could potentially result in lost customers, particularly in light of the known economic difficulties within the coal mining industry. In finding that the president's works did not constitute a violation of the Act, the Board reasoned that the tone of the company president's statement was "exceedingly speculative," that there was some factual basis supporting the referenced competition among coal operators in the troubled industry, and that the statements involved "matters beyond the Respondent's control" (interruptions of deliveries in the event of a strike). Thus, citing *Gissel,* supra at 618, the Board in *Action Mining* concluded that no violation existed where it was "unreasonable" to perceive that the employer "may or may not take action solely on his own initiative for reasons unrelated to economic necessities known only to him."

Unlike the president's speech in *Action Mining,* Kaltenbacher's references to the partial plant closures and loss of jobs in its Newark facility were anything but speculative. Rather, Kaltenbacher was recounting actual past actions he had personally taken, with the specific implication that he could take the same action at the Saxton plant, "solely on his own initiative for reasons unrelated to economic necessity." Most importantly, Kaltenbacher's implied threat of plant closure which was clearly more egregious than the alleged threat of lost customers in *Action Mining,* is distinguishable from the statements in that case because it in no manner involved matters beyond Respondent's control. Finally, in evaluating the alleged threat in *Action Mining*, the Board again cited *Gissel,* supra at 617, for its proposition that the employer's remarks to employees had to be analyzed in "the context of its labor relations setting." Viewing Kaltenbacher's speech in light of the ESOP which followed the threat is clearly looking at the old carrot and stick routine in reverse. First, threaten employees with loss of jobs if the Union comes in and then give them a positive reason to reject the Union. I find for the reasons set forth above that Kaltenbacher's speech violated Section 8(a)(1) of the Act.

d. The Jim Eichelberger incident

According to William Swope Jr. in February 1995 he was working and Jim Eichelberger and Joe Palko were nearby. Employee Sam McKnight came up to these two men and started a conversation. Concerned that the conversation might be about a work related problem, Swope approached the three. He heard McKnight say that this would be a nice place for a skating rink. McKnight continued by saying if the Union came in the place would close. Then McKnight said, "right Ike?" Eichelberger responded, "Right." Eichelberger then asked Swope if he ever worked at a fast food place before. Swope asked why, and Eichelberger did not reply. McKnight then told Swope that if the Union came in, the place would get rid of troublemakers like Swope. Eichelberger then said Swope had better start looking for a job now because the place did not want troublemakers like him. Eichelberger ended the conversation by telling Swope not to take him seriously, that he was joking.

Sam McKnight testified that one night at work he was having a conversation with an employee with whom he went to school, Anna Marie Watson. Swope was nearby. Someone questioned what the building would be like if empty, and McKnight testified he replied it would make a good skating rink. Risman added that it would be nice to roller skate from side to side. McKnight denied Eichelberger was part of this conversation. At the time of this conversation, McKnight was not in a supervisory position. Eichelberger also denied taking part in this conversation. Anna Marie Watson generally corroborated McKnight's version of this conversation insofar as the absence of Eichelberger is concerned. She testified that before he entered the conversation she and some coworkers were speculating about what would happen if the Union came in and the company closed the plant. According to her McKnight entered the conversation at a point when the employees were discussing the uses to which an empty plant could be put.

I do not credit Swope's testimony in this regard. I believe he is prone to exaggeration. Instead, I credit Eichelberger's denial that he was part of this conversation as corroborated by Watson and McKnight. Accordingly, I find no violation of the Act as the conversation was strictly between employees and not management.

C. The Alleged 8(a)(3) Violations

1. Did Respondent violate the Act by refusing and continuing to refuse to hire Thressa Hiquet?

As noted earlier, Thressa Hiquet is the daughter of R. James Hiquet, who has been president of the local Union for about 25 years. Thressa Hiquet, (Hiquet), has lived at home with her parents for most of her 27 years. James Hiquet's position was well known to Respondent and it directly refers to him in his union position in its campaign literature and video. Also, as noted earlier, Hiquet and her brother owned Hiquet's gym and operated a small business there, leasing the second story to the Union for its campaign headquarters, a fact well known to the Respondent.

Responding to a Altoona newspaper advertisement placed by Respondent on October 26, Hiquet applied for employment with Seton. Her application was filed with interim temporary

services (ITS), an employment company then utilized by Seton for screening potential new hires. On October 26 she filed a written application for employment and was given a dexterity test by ITS. On her application she expressed a preference for a light production or clerical position. Her application form filled out for ITS reflects she would perform medium work, involving lifting 21 to 50 pounds and was available for work at anytime. She ranked in the second best categories in both her industrial and clerical skills tests given by ITS. She met the initial criteria for employment and her application was referred to Seton's human resources department. Subsequently, about 2 weeks later she had an interview with Julie Reed at Seton. Reed had the independent responsibility for interviewing and hiring of new production and clerical employees. Hiquet and Reed knew each other prior to this interview as they attended school together in the area. Because of their past acquaintance, Reed knew of Hiquet's fathers' union affiliation. According to Hiquet, during the interview Reed told her that Seton was not hiring secretarial help at that time, but, would keep Hiquet in mind. She also said that Hiquet had the necessary skills to fill a position in the shipping department. Reed noted that Hiquet did not have factory skills, and Hiquet said she was willing to learn any skill necessary to get employment at Seton.[9] Hiquet credibly denied that she ever said she would not take a production job. She also denied stating that she would not work on second shift.

Reed interviewed employees sent by ITS and if she wanted to hire them she would contact ITS and they would have the person appear for work. She testified she decided that day not to hire Hiquet though other applicants interviewed that day were subsequently hired. Reasons given for Reed for not hiring a particular applicant included not having proper transportation, lack of flexibility for shift work, unwillingness to work overtime, or if the person was uncooperative, or difficult during the interview. Other reasons included job hopping. None of these reasons apply to Hiquet. Reed testified that she did not hire Hiquet because she wanted clerical work and Seton was not then hiring for clerical positions. She testified that it was her experience that if you hired a person wanting clerical work in a production position, there is a high degree of turnover. I would note that there is no credible evidence that Hiquet restricted her application to a clerical position and to the contrary, the application form filled out by her specifically states she is available for light production work, the type job Respondent was filling in great numbers at the time of the interview with Reed.

Following this interview, having not heard from Seton, Hiquet returned to the facility's office on November 15 and obtained another application, filled it out, and gave it to the Company's receptionist. She filed this second application to show initiative and demonstrate interest in getting a job at Seton. She called the facility the following week, but the receptionist would not put her call through to either Julie Reed or Mark Taylor. Her November application shows that she desired office or production work, indicating a preference for office work. Under employment history, she shows a company for which she worked in clerical/secretarial position for the 6 years prior to seeking employment with Seton. She left this employment because she had an accident that left her unable to work for a period of time. She gave the same reference on the ITS application form. She testified that she had been taught in business school to list only references covering the previous 3 to 5 years. Though not noted on the application form, she had worked for several other employers since finishing high school. She worked for Lake Graystown Resort and Lodge in the summer of 1987 as a receptionist. She quit that employment to attend a business school in Pittsburgh. She returned to the area in 1988 and worked a few months at Lake Graystown until she got a better job. She stayed in that position until early 1994 when she was injured in an automobile accident and was unable to work for a while. In the summer of 1995 she again worked at Lake Graystown as a waitress. As of the time of hearing, she worked at a restaurant in the VFW hall as a waitress and worked for a while as a waitress in a Saxton restaurant called the Happy Hollow Inn for a month. It is Hiquet's position that she quit this employment after a disagreement with the owner. The daughter of the owner of Happy Hollow testified that Hiquet was discharged for rude behavior. It appeared to me to be a mutual quit situation, though it is immaterial either way.

Reed further testified that subsequent to the interview, Hiquet called her and asked for an application for employment. Reed referred Hiquet to two job placement services and Hiquet at this point became angry and said that she knew that Reed had recently hired a friend of hers. To calm her, Reed told Hiquet she would leave a form with the receptionist and for Hiquet to pick it up. According to Reed, later that day, she encountered Hiquet in the plant parking lot. Hiquet told her that she did not want Reed or Taylor to discriminate against her because of her family's affiliation with the Union. She said her family only worked for the Union to make extra money and that if Reed's family needed the money she would do the same thing. Reed replied that Hiquet's union affiliation was not considered in the hiring decision. Following this conversation Reed reviewed the newly filed Hiquet application. Reed testified that she noticed that Hiquet had missed an employer because she had worked with Hiquet at Lake Graystown years before.[10] She then testified that she and fellow human resources department member, Sue Rankin, had discussed Hiquet's performance at that job after she noticed that this employer had not been listed. Rankin told her that she had worked there with Hiquet and that Hiquet had not been a good performer at that job. This employment was at some point in the 1980s while Higuet was in high school.

After Hiquet's contact with Reed in the Seton parking lot, Hiquet called Reed inquiring about filling a production clerk position, a position for which Seton was interviewing appli-

[9] Based on a number of application forms introduced in evidence, hardly anyone applying for a position with Seton had factory skills, as most had worked in food service or nursing home jobs before applying at Seton. This lack of previous factory skills did not keep them from being hired by Reed.

[10] Hiquet placed this parking lot conversation in January 1995. She remembered asking Reed why she had not been hired as Respondent was hiring new employees. According to Hiquet, Reed told her that she had no control over the hiring process.

cants. Reed told Hiquet she would review Hiquet's application with Mark Taylor. Reed testified that Hiquet was not considered for this position as she left off an employer on the application form. The requirements for the production clerk position are good computer skills and good rapport with people, both attributes which Hiquet possesses.

Taylor testified that Reed told him of the parking lot incident with Hiquet and said that Hiquet was demanding to be hired and was giving Reed a hard time. I would note parenthetically that even crediting Reeds version of the parking lot conversation, there was nothing threatening about it nor did it amount to giving Reed a "hard time." Reed told him that Hiquet was not qualified for positions that were being filled at the time and that she had falsified her application by not listing at least one, if not more, previous employers. At this time Reed had total authority to hire without Taylor's input. Taylor then informed Reed to not hire her, that he would not hire anyone who had treated Reed the way Hiquet had. Reed testified that she personally did not care if the Union came in at Seton. On the other hand she signed an antiunion petition. Reed knew Hiquet's father was connected with the Union and she knew of Hiquet's involvement with Hiquet's gym. Taylor was likewise aware of Hiquet's familial ties to James Hiquet and of his position with the Union.

After talking with Reed about the Hiquet application, Taylor notified labor counsel about Hiquet's application. It was only after this time that Taylor had an employee make reference checks on Hiquet. This was done at the Company's labor counsel's suggestion, to make a good record as to why she was not hired. The reference checks were made at a point well after Reed had made the decision not to hire Hiquet solely because she wanted a clerical position. Such reference checks by Respondent are very rare for persons applying for the type of positions which Hiquet sought. Given the timing of the checks, I find that they were done solely to try to find support for the previously made decision not to hire Hiquet. For example, one such call was made to Lake Graystown to verify dates of employment, though Reed was already personally aware that Hiquet had in fact worked there and the dates of that employment.

Though Seton job applications are kept on file for a minimum of 6 months, Hiquet was never offered employment nor told the reason why she was not hired. During the timeframe when Hiquet was applying for work, the hiring decision could have been made by Reed, Taylor, or Susan Rankin. Hiquet was interviewed on November 3, 1994. Between September 1, 1994, and January 25, 1995, Seton hired at least 158 employees. This number does not include employees hired through ITS or other employment agencies used by Seton. In this regard, during the 6 month period beginning in October, Respondent has hired hundreds of employees through ITS for the type of jobs for which Hiquet had applied. In addition to the large number of production jobs filled in the 6 month period following Hiquet's application, Seton hired several production clerks.

The General Counsel introduced evidence relating to individuals interviewed on the same day as Hiquet. These records reflect that though these applicants had no plant experience, had shift preferences, and clearly failed to indicate all of the places they had worked prior to applying for work at Seton, they still got hired.

The General Counsel introduced records showing that a woman named Sherry Crowe was interviewed on the same day as Hiquet and was hired on November 14, 1994, to work on an incremental press. Her prior employment history as reflected by Respondent's notes of her interview shows she worked in a nursing home and for a fast food restaurant. Her actual application reflects only one prior employer, Mama G's restaurant where she worked as a waitress. She indicated a preference for third shift, but, was willing to work on second.

Another person interviewed on the same day as Hiquet was Randee Price. He was hired on November 14 to work on an incremental press. In his interview he expressed a preference for third shift, but would work second. His formal application reflects only one past employer, Hardee's restaurant where he cooked, took orders, cleaned, and ran the cash register.

Another person interviewed on the same day as Hiquet was Trisha Ferguson Childress. She was hired to work on an incremental press on November 21. Her application form reflects two prior employers, one a nursing home where she worked as a nurse's aide and the other Lake Graystown Resort where she worked as a laundry attendant. The file does not reflect if any reference check was made.

Two other applicants, Danny Thomas and Mary Lou Houck, were also interviewed on the same day as Hiquet and were hired.

A Lisa Merkle was hired on November 21 as an incremental press operator. In her interview she indicated a preference for second shift. Her application reflects only one prior employer, Hardee's restaurant where she cooked, cleaned, and ran the cash register.

The Board has held that the failure or refusal to hire employees because they are, or are believed to be, members of, or engaged in activities on behalf of a union, or because they are relatives of persons engaged in such activities, violates Section 8(a)(3) of the Act. *Crown Cork & Seal Co.,* 255 NLRB 14, 15, 42, 50 (1981); *Embassy Suites Resort,* 309 NLRB 1313, 1330 (1992); *A & A Ornamental Iron,* 259 NLRB 1019 (1982); *TIC-The Industrial Co. Southeast,* 322 NLRB 605 (1996). As stated by the Board in *Fluor Daniel, Inc.,* 311 NLRB 498 (1993) at 498:

> In *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth its test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's action. The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its action are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Un-

der certain circumstances, the Board will infer animus in the absence of direct evidence.

Respondent's proffered reasons for not hiring Hiquet appear to me to be totally pretextual. The General Counsel has shown by substantial and credible evidence that Hiquet possessed the necessary qualifications for production work and for clerical work, including that of production clerk. Respondent has hired several such clerks since Hiquet's application was filed. It is telling that Respondent has never informed Hiquet of any reason why she was not hired. It is similarly telling that at a point in time well after the decision had been made not to hire her, Respondent engaged in an investigation to find additional reasons for the decision. The General Counsel has established by credible evidence all the requite factors for a prima facie *Wright Line* finding of discrimination based on union animus. Both Reed and Taylor knew at the time of the filing of the initial application of Hiquet's father's affiliation with the Union. Respondent and particularly Reed were shown to harbor union animus. Reed signed a letter to the Union asking that it "stop interfering with my employment." Respondent's animus is clearly established by the numerous 8(a)(1) violations it committed, including the clear animus harbored by CEO Kaltenbacher.

Respondent has not begun to satisfy its burden of showing it would not have hired Hiquet absent her known union sympathies and relationship with James Hiquet in response to the prima facie showing made by the General Counsel. Hiquet was clearly as qualified for a production job as any of the applicants interviewed on the same date as she, and was as qualified for a clerical job as anyone hired insofar as this record reflects. In short, Respondent has offered no credible reason for not hiring her and, I find, that the General Counsel has proven that Thressa Hiquet's actual or perceived union sympathies and activity and/or that of her father was a motivating factor in Respondent's decision not to hire her. I find that by so discriminating against Hiquet, Respondent has violated Section 8(a)(1) and (3) of the Act.

2. Did Respondent violate the Act by its threats to employee Lynn Wesley and its termination of her employment?

Lynn Wesley was employed by Seton from October 1991 until her discharge on December 30, 1994. At the time of her discharge she was an incremental press operator. Wesley became involved in the union campaign in July 1994. She attended the first union meeting and signed up to become a member of the employee in-house organizing committee. This first meeting was held at Hiquet's gym and was conducted by union organizer Rich Trinclisti and John Sacco from the International Union. About 30 employees attended the meeting. Thereafter, Wesley attended meetings on a weekly or more frequent basis at Hiquet's Gym. She also assisted Trinclisti in such organizing tasks as finding phone numbers and addresses for other employees so he and other organizers could make house calls on them. During the month preceding her discharge, Wesley was helping the organizing campaign at the gym, 5 or 6 days a week.[11] She was on the in-house committee's public relations committee along with several other employees. In this position, among other things, she and her fellow committee members called on the publishers of the local papers to encourage them to publish letters and press releases supporting the organizing effort. One such letter was published on August 24, signed by a number of the members of the in-house committee including Wesley. The letter claimed that the Union was supported by a majority of the Respondent's employees. On September 1 Seton's vice president, Herman Winkler, had distributed to employees a letter where he references the letter and informs employees that the Company had filed a petition with the Board for an election. He also had a letter setting out the Company's position published and this was independently distributed to employees.

On August 29, 1994, Wesley's union support and that of a large number of other employees was made know to Seton when a list of the employees comprising the in-house organizing committee was faxed to Respondent.[12] Wesley testified that she passed out about 30 to 40 authorization cards to fellow employees. Wesley wore union insignia on her clothes at work almost daily until her discharge. A number of other employees did likewise. She also decorated her car with union signs and bumper stickers. During the campaign she talked with other employees encouraging them to support the Union and explaining the benefits of a union to them. In September Wesley engaged in handbilling at the plant. She and eight or nine other employees distributed a handbill taking to task Herman Winkler. This handbilling occurred about a block from the plant across the street from the home of a plant official, Tim Brennan. Shortly thereafter management distributed to employees another memo, this one answering the charges in the handbill distributed by Wesley. During the course of the campaign in the fall of 1994 Wesley and other union supporters posted on Respondent's bulletin boards and otherwise distributed to employees a number of handbills criticizing management. Wesley also testified on behalf of a terminated employee, Gary Carroll, at his unemployment hearing which was opposed by Respondent.[13] This testimony was given in September or October. In November the local paper published a letter in support of the Union written and signed by Wesley's daughter.

Wesley worked third shift, from 10 p.m. until 6 a.m. First shift was from 6 a.m. until 2 p.m., and second ran from 2 p.m. until 10 p.m. Wesley's immediate supervisor was group leader, Keenan Childers, and his supervisor was third-shift supervisor, Tina Detterline.[14] Detterline reported to cutting plant production manager, Steve Putt. At the time of Wesley's discharge, the Respondent maintained a written disciplinary policy. It

[11] Trinclisti described Wesley as being totally dedicated to the union campaign.

[12] There were approximately 95 employees named on the list.

[13] Carrol, like Wesley, was discharged without first being suspended. He was discharged for incorrect logging of die checks.

[14] Tina Detterline has been employed by Seton for 10 years. She began as an inspector, went to hide cutting, then to a group leader position, then to third-shift supervisor. At the time of hearing, she had achieved the position of assistant production manager.

notes a number of offenses which can result in discipline, then notes:

> "THE FOLLOWING CORRECTIVE ACTION PROCEDURE WILL GENERALLY APPLY:
>
> 1. A VERBAL WARNING
> 2. A WRITTEN WARNING AND A MEETING WITH YOUR GROUP LEADER
> 3. SUSPENSION FROM WORK WITHOUT PAY FOR UP TO THREE DAYS
> 4. DISCHARGE

A number of witnesses, both employees and management persons testified about the disciplinary policy. Based on this testimony as well as a review of the number of personnel records placed in evidence indicates to me that this disciplinary system was not consistently followed. Various supervisors issued discipline based on their individual feelings about what certain offenses warranted, and often gave more than one verbal warning and more than one final warning. Suspensions do not appear to be a regular part of the discipline issued in the time frame around when Wesley was discharged, though there were some suspensions issued during this time. Prior to her discharge, Wesley was issued three warnings from Respondent.

In February 1994 before the start of the campaign, she was given a written verbal warning for stamping some tally numbers on the wrong end of pieces and inverting some tally numbers. These tally numbers indicate the job lot to which the pieces belong.

She received another warning in June 1994 for smoking in an undesignated area along with a number of other employees. This warning constituted her second written verbal warning.

On September 10, 1994, she received a written warning for improperly stacking dies, causing them to be smashed and requiring a new bed to be ordered for the press on which she was working. The dies were placed on the bed by a temporary employee and Wesley, who was supposed to be watching the bed did not notice. Both employees received the warning. Wesley's warning states "continued carelessness and unsatisfactory work will result in termination." This warning, as well as the smoking warning were given by Tina Detterline.

According to Wesley, later on this day, she had a conversation with Detterline. She complained that she thought it unfair to be threatened with termination for continued carelessness sand unsatisfactory work, pointing out that many employees had committed more serious offenses. Detterline responded, "[T]he way you are acting now, if you breathe wrong, you'll be out the door."

Detterline testified that she issues discipline for performance issues only. She issued a warning to Wesley and about 15 other employees for violating the Company's smoking policy. She issued a warning to Wesley and her partner for smashing dies. In both of these instances a warning was also given to employee Don Young who was not known to management as being a union supporter.[15] At the time of this warning, Detterline testified that she told Wesley that she was receiving a written warning and that a future occurrence of carelessness or unsatisfactory work would result in termination. She denied telling Wesley that "[T]he way you are acting right now, if you even breathe wrong, you are out the door." This threat is alleged to be an independent violation of Section 8(a)(1).

At this point a credibility resolution must be made. Detterline was a major player in the discharge of Wesley. Detterline was one of the most impressive witnesses I have ever heard and she appeared to be telling the truth. However, as will be shown with respect to Wesley's discharge, Detterline did a number of things which call into question her veracity in denying that Wesley's protected conduct on behalf of the Union played any part in Wesley's discharge. These actions will be discussed below. I will credit Wesley's testimony. Having credited Wesley, I do not find that Detterline's statement violates the Act as alleged in the complaint. There is no clear showing from the words spoken that Detterline was referring to Wesley's union activities. The threat came on the heels of Wesley having broken company property through carelessness. The reference by Detterline to "the way you are acting right now" could logically have referred to Wesley's carelessness in smashing the dies, which would have been consistent with the warning given Wesley. For this reason, I decline to draw the inference urged by the General Counsel and will recommend that this complaint allegation be dismissed.

Wesley testified that in late November or early December, she had a conversation with production manager, Steve Putt. Wesley testified that she and a number of other employees were concerned with how their pay was calculated, so she approached Putt and asked if he would give the formula by which pay was figured so the employees could keep track of their own pay. He declined to give the formula saying management had not figured everything out at that point. They argued a little, then Putt ended the conversations saying that "you folks who run around with the Union hats and T-shirts are all wet." Putt was scheduled to testify in this proceeding, but was unable to attend because of an emergency business meeting out of this country. I have no reason to doubt the truthfulness of the representation made by Respondent as to the reason for his not testifying. Therefore, I will not draw any adverse inferences from his nonattendance. However, in the absence of a denial or explanation from Putt, I do credit Wesley's testimony about this conversation and specifically his disparaging remark about the Union and its supporters.

Subsequently, in December Wesley had a conversation with Herman Winkler. A few weeks before, in a conversation, Wesley had asked Winkler to commit to not cutting employees pay and to enter into a contract with the employees so that they would be more secure. The December conversation started with Winkler saying that he thought he knew where she was coming from and that he had thought they were friends. He asked what the problem was. Wesley told him that he lied. She explained that about a year ago he was quoted in a newspaper article saying there would be no pay cuts at Seton. She said that in their earlier conversation he had said he could not promise there would be no cuts. He responded that she was asking him to do something illegal. She asked what was illegal about

[15] Young was later terminated for apparently purposely damaging a piece of hide. He was not suspended prior to his termination.

promising no pay cuts. He replied that it was because of the Union, and complained that she was hounding him to do things he could not do and he was not going to let anyone tell him how to run the company. He ended the conversations by saying, "One has to be very careful if they expect to live a long life." Herman Winkler did not testify and I accept Wesley's recitation of this conversation, including his implied threat.

The events that lead to Wesley's termination took place in the last week of December, shortly after she had had the two Union related arguments with top management noted above. In December Wesley was working as part of a four person incremental press team. To understand what the team does, a little background of the total Seton Saxton operation is necessary. Tanned cowhides arrive at the facility from the Newark facility and are stamped with lot and tally numbers so they can be tracked through processing. The hides are then conditioned and sent to the hide markers. These employees mark in chalk any defects in the hides so they may be avoided in the cutting process. There is a great deal of evidence in the record about defects, but, it is unnecessary for the purpose of this decision to detail the types of defects. Each of Seton's customers have different quality specifications. Some will accept certain defects, whereas, others will not. None will accept finished pieces with chalk markings left on. After the hides are marked they are given to an incremental press team composed of four members. The team has a job assignment specifying how many and what pieces should be cut by the press. Two of the members (layout persons) place the cutting dies on the hide seeking to get the maximum number of acceptable pieces from each hide, avoiding chalk marked defects. The hides are a bed and when the dyes have been placed the bed is rolled into the press which presses the dyes down and cuts the pieces. The bed is removed and the pieces are removed and cleaned of chalk marks and stacked for shipment to the next department by the other two members of the team called pickers. The process is then repeated. Some of the cut pieces are shipped as cut and others go to a department (perfing) which perforates the pieces with a number of small holes allowing the piece to "breathe." The pickers are supposed to remove any chalk which may be on the cut pieces.

As of the time of the Wesley termination, the Company held all four members of a press team to be equally responsible for production errors such as failure to remove chalk markings. At a later point, it changed its marking system to allow for an individual employee's actions to be determined, and at that point only individual members who erred would be disciplined. In December 1994 the entire team was responsible for quality control which was augmented by quality control inspectors who randomly spot checked some of the jobs. If a number of errors of whatever type were discovered by these inspectors the job would be put on hold until the problems were corrected. A hold penalized the team because it cut into their production on which their pay was based in part. An employee's pay would be affected by the team's speed in cutting pieces, its "yield," the number of pieces that could be obtained from a given hide, and the quality of their cuts including removal of chalk marks. Teams on which Wesley was a part received a number of holds, some of them occurring before and some after the onset of the union organizing campaign. No discipline resulted from any of these holds. At the time of Wesley's discharge and for a considerable period before and continuing to date, leaving of excess chalk on cut pieces constitutes a major problem for Seton.

On December 27 Wesley was working on a press with team 123. This team was composed of Wesley, Michael Way, Dan McKaig, and Jason Mills.[16] On the night of the 27th, Way was absent. On that evening the three person team cut 84 hides, a high number for a three person team. According to Wesley, on the following night, the full team was present and while they were working, their immediate supervisor, Keenan Childers, came to them and told them ten to fifteen of the pieces cut the night before had chalk on them and needed to be cleaned up. According to Wesley, the team cleaned the pieces and gave them back. Nothing was said at this time about any discipline resulting from the chalk on the pieces. At no time on the nights in question was team 123 audited or shutdown. I would note parenthetically that the record contains evidence of an overwhelming number of recorded failures by teams to remove chalk, many far worse than that involved with team 123.

Jason Mills, who is no longer employed by Seton, testified. He remembered Childers telling the team on the first night that they had to slow down and pay attention, and that they cannot do this (allow excessive chalk). On the first night he remembers he was laying out and Wesley was picking.

Keenan Childers, who at the time of hearing had been terminated by Seton, testified about these events. Childers testified that on the first night in question Sam McKnight, supervisor in the perfing department, notified him of excessive chalk on parts cut by Wesley's team. Subsequently, Childers and supervisor Jim Eichelberger investigated the job and found excess chalk. They then went to team 123 and notified them of the problem. He had them clean the parts involved and told them not to let excess chalk get by them again. The following night Childers was again informed by McKnight of excess chalk on parts coming from team 123. He testified that the problem was severe and he had photo copies made of the defective parts and then went to Putt. Putt suggested that Detterline issue discipline. Putt also called Human Resources Director Taylor at home to tell him of this recommendation. According to Childers, discipline was called for because the excess chalk was serious and the team had been warned to be careful the first night. Childers denied that Wesley's union sympathies had anything to do with her discipline, though he played no part in the disciplinary decision and would not be privy to Putt's motivation. On the first night Childers remembers about 20 pieces being found with excessive chalk and on the second night there were about 50 to 60 such pieces.[17]

Detterline testified about her part in Wesley's termination. She returned from Christmas vacation at 9:30 p.m. on December 30. Her group leaders told her that Steve Putt would be calling her because of a problem with excess chalk on team

[16] Michael Way and Dan McKaig were also members of the union in-house committee.

[17] At Wesley's unemployment compensation hearing, Childers put this figure at 30 pieces. Written documentation indicates that the 60 pieces figure is correct.

123, Wesley's team. He also told her that perfing had discovered a number of parts made by the team that had excess chalk. Childers told her that he had warned the team to be careful about the problem, but the next night the problem reoccurred. Putt then contacted her and told that discipline should be issued because of the excessiveness of the chalk. She then collected some of the parts involved and took a short statement from Childers. As a result of her investigation of the incident, Detterline testified that she believed the team deliberately left chalk on parts, in an attempt to increase yield.

Wesley's termination notice in regard to the description of the reason for discipline is identical with that given the other team members. It states that the perfing department had brought to Childers' attention that they had found 10 to 15 pieces with excessive chalk coming from team 123 and had cleaned them, but that they were finding more. Childers and group leader, Jim Eichelberger, investigated and personally found 19 of the first 120 pieces they inspected to have excessive chalk. Childers took these pieces back to the team to be cleaned. The next night more parts from team 123 were found with excessive chalk and it was determined that no effort had been made to correct the problem. Childers testified that he wrote this description, but that Detterline rewrote it for his signature because of his spelling errors. Detterline testified that she wrote it after an investigation because Childer's description was not complete enough.

Wesley reported to work the next day and she was assigned another position, not an unusual occurrence according to her. While working, Childers came to her and told her to gather up her stuff and follow him. They went to Steve Putt's office where she found both Putt and Tina Detterline. According to Wesley, Detterline said, "We can't have this." Childers picked up two pieces of leather with chalk on them and said they were unacceptable rejects. Wesley said chalk is removable, so they could not be unacceptable rejects. Childers asked what she had done with the pieces he had brought to the team the night before and Wesley said they had cleaned them. She mentioned that he had said nothing about discipline at that time. She also pointed out there was no way to tell which team member was responsible for the excess chalk. Putt then said, "We're not going to take any crap any more. Now, this is unsatisfactory work and there is no choice other than to terminate you." She asked if the termination was not extreme since the normal procedure for excess chalk was a "shutdown."[18] Putt responded that it was not extreme. Wesley asked if she was the only team member terminated and Putt said she was. Wesley also claimed that Putt somehow related to the conversation she had had earlier with him about employees wearing union insignia were all wet.

Michael Way testified about this event. Way was employed by Seton as an incremental press operator from May 1993 until his termination in January 1996. Way was actively in support of the union effort and was on the in-house committee. On the night after Childers had shown the team the excess chalk, Detterline came to where he was working and told him to come to the office. In the office were Detterline, Eichelberger, and Childers. Detterline showed him photos of excess chalk and some pieces with chalk on them. She said he was being written up for the excess chalk. He was given a verbal written warning. He had been given an earlier verbal warning for failure to follow instructions on September 14.[19]

Detterline testified about the disciplinary meetings with the members of team 123. She testified that once it was decided that discipline would be issued to the team they were called one at a time into a meeting with Detterline, Steve Putt, and Childers. According to Detterline each of the team members other than Wesley blamed Wesley for the problem, saying that on the first night the problem occurred she was trying to show that the team could produce more pieces without the presence of Way that it could when he was there. According to Detterline, she terminated Wesley since her last discipline included a warning that she would be terminated for the next occurrence of careless performance. She testified that she did not suspend Wesley because the Company was not issuing suspensions at that time. However, Jason Mills received a suspension from Herbert Winkler 3 weeks after Wesley was terminated. Other employees were also suspended during this general timeframe. As will be shown later, Detterline herself, on the day Wesley was fired, threatened to suspend an employee if he made another production mistake.

Detterline testified that at the meeting at which Wesley was terminated, Wesley expressed her opinion that it was silly to terminate her for excessive chalk when it was something the customer could remedy. Detterline explained management's position that it was the failure of the team to correct the problem that was the genesis for the discipline. She testified that during the conversation with Wesley, Putt said "enough of this crap," because they were just going back and forth and not facing the issue. I find it significant that of the four employees disciplined, only Wesley was discharged. Further, as far as I can determine from the record, Wesley is the only employee Respondent has discharged for a problem related to excess chalk.

[18] At this time, if quality control auditors found a problem on a job, they would require the team responsible to shutdown production and cure the problem before continuing production. This would adversely impact the teams' daily earnings. This shutdown was also called a "hold."

[19] Way worked the night following his warning on team 123, with an employee named Kevin Kinsey replacing Wesley. The team was audited and chalk was found on some of their pieces. Way asked the auditor if he could speak with Childers about the problem and Way asked Childers if the team could shutdown until the problem was solved. He gave approval and the team cleaned the pieces with excess chalk and no discipline resulted. Way also testified that in mid-December, team 123 was audited and shutdown because of excess chalk. While cleaning the pieces found by the auditor, they found chalk from the prior shift. While doing so, Detterline walked by and Way told of the discovery. According to Way, Detterline told him not to worry about the prior shifts chalk, just cleanup their own. He asserts that after this conversation, he told the same thing to Childers and was given the same response. According to Way, no discipline was issued to the prior shift. On January 11, 1995, Childers found chalk on pieces cut by the team and told them to clean them and be more careful. No discipline issued. A similar occurrence took place on February 5 or 6.

Way prepared a statement with Jason Mills on or about March 2, 1995, concerning the incidents of December 27 and 28. According to Way his participation in the preparation of the foregoing was prompted by Detterline who came to him and asked what he meant in the portion of his warning where he had written: "I would like to state that the problem was addressed to the team and in my opinion some team members did listen and others did not." He told her that he was not going to say anything and she responded that it could come to a court hearing and he might be called to testify. According to Way, he told her he did not want to testify against any of his teammates. She repeated that he might have to testify and Way suggested he would just tell her what he meant. He and Jason Mills then wrote the handwritten version. Because Mills had a problem with writing, Way wrote what Mills told him. This creates the impression when reading the statement that Way was present on the night of December 27 when he clearly was not present. This handwritten statement reads:

> On the night . . . we ran a 3 man crew. Dan was laying out and Lynn and Jason wa[sic] picking. Lynn had the lefts, Jason had the rights. Keenan brought back 30 or more. There were about 25 pieces that were lefts and about 5 were rights. At this time Lynn said lets show Make what we can do when he is not around. I[n] my opinion most of the pieces belonged to Lynn Wesley. was responsible for all most of the majority of the excessive chalk. On the next night we were a 4 man crew. We worked 2 team members per table. We picked layout and picked our own parts. Mike Way was the only one who had changed his stamp. He separated his 3 in the team #. the next night Keenan brought us more pieces with chalk from perfing. Keenan told us to clean the pieces and then the next night we wee split up. Michael Way was on another team. Dan, Jason and Lynn were hand cutting. We were called into the office one at a time. Again—we feel Lynn Wesley was responsible for the greatest part of pieces with excessive chalk. Signed by Way and Mills.

After the handwritten statement was given to Detterline, she typed a version of the statement. Any variations between the handwritten statement and the typed version were the idea of Detterline, who claimed she got the okay for the changes from Way and Mills. This typewritten version of the handwritten statement reads:

> Our team ran a 3 man team on the Chrysler JA on December 27, 1995. Mike Way was absent. Dan McKaig did lay out and Lynn Wesley and Jason Mills picked the parts and cleaned them. Lynn Wesley made a statement about showing Mike what they could do when he want' there. Keenan Childers brought back approximately 30 parts from perfing with excessive chalk that were from that job. There were about 25 left parts and 5 right parts. Lynn was responsible for the lefts and Jason was responsible for the rights. It is my opinion that Lynn Wesley was responsible for the majority of parts with excessive chalk from that job. Mike Way was present on the night our team was shown the parts.
>
> On the next night, we were a four man team. We worked two people per table. Those two people did layouts and also picked and cleaned their own parts. Mike Way was the only team member to change his stamp. From that job, Keenan brought pieces from perfing again. They too had chalk on them. There were about 15 pieces. I feel these pieces were Lynn Wesley's responsibility, because myself and the other team members were careful to clean the chalk. Lynn did not pay close attention to quality when she worked for speed. Again, I feel that Lynn Wesley was responsible for the greatest part of pieces with excessive chalk. signed Michael Way.

Detterline testified that the statement of Mills and Way were prepared at the request of human resources for use in an unemployment compensation hearing involving Wesley. She testified that she called the two employees to her office and asked if they would be willing to give a statement about the events leading to Wesley's discharge, explaining that their statement would be confidential and there would be no repercussions if they did not want to give a statement.

Wesley filed for unemployment, and, this was opposed by Respondent. At the meeting held by the State, according to Wesley, Putt said that the disciplinary procedure was not followed in her case because the infraction was so severe. According to her, Putt had admitted that it was impossible to tell who was responsible for the excessive chalk on the night in question. Subsequently, the company changed its methods of operation so that individual responsibility could be placed for errors rather than just assigning error to the team as a whole.

As noted earlier, the test used by the Board to decide whether adverse action against an employee was unlawfully motivated is set forth in *Wright Line,* supra. The General Counsel has established animus on the part of Respondent. In a general sense Respondent's animus as demonstrated by the violations of Section 8(a)(1) found to have been committed earlier in this decision. More specifically the evidence establishes personal antiunion animus directed toward Wesley's protected activities on the part of the person who directed her final discipline, Steve Putt, and on the part of Seton's highest ranking management person at Saxton, Herman Winkler. The General Counsel has shown that all of the members of management playing a part in the discipline meted out to Wesley were well aware of her union support. The General Counsel has also shown that Wesley was the only employee to have been discharged over a chalk related problem, though such problems are one of the most prevalent problems faced by Seton at Saxton. Moreover, given the number of chalk problems shown to have occurred at the plant, it is fair to say that giving discipline over such a problem is rare. The record in this case is replete with examples of chalk problems more severe than that experienced by team 123 on the nights in question and no discipline being issued. By way of example, Michael Way worked the night following the day he received his warning on team 123, with an employee named Kevin Kinsey replacing Wesley. The team was audited and chalk was found on some of their pieces. Way asked the auditor if he could speak with Childers about the problem and Way asked Childers if the team could shutdown until the problem was solved. He gave approval and the team cleaned the pieces with excess chalk and no discipline resulted. Way also testified that in mid-December

team 123 was audited and shutdown because of excess chalk. While cleaning the pieces found by the auditor, they found chalk from the prior shift. While doing so, Detterline walked by and Way told of the discovery. According to Way, Detterline told him not to worry about the prior shift's chalk, just cleanup their own. He asserts that after this conversation, he told the same thing to Childers and was given the same response. According to Way, no discipline was issued to the prior shift. On January 11, 1995, Childers found chalk on pieces cut by the team and told them to clean them and be more careful. No discipline issued. A similar occurrence took place in February. This credited evidence strongly indicates to me that the purpose of the discipline issued to team 123 was solely intended to provide a vehicle to drive Wesley out of the plant.

It is a shame that Steve Putt could not testify as he was the person that the evidence reflects made the decision to issue discipline to team 123. Though, Detterline testified at length about the discharge of Wesley, she was on vacation when the problems with the team occurred and may never have known of them had not Putt decided to issue discipline. This decision was made prior to Detterline's return to work after the chalk incidents occurred. This decision was made prior to Detterline's investigation into the matter. This decision was made prior to her being told by other team members that the problem was caused by Wesley. Respondent's attempts through Detterline's testimony and her actions in causing the production of the statements by Way and Mills which blame Wesley for the chalk errors also seriously undermine Respondent's assertions that chalk errors were the cause of Wesley's discharge. At the time of the December incidents Respondent admitted it had no way of determining which team member would be at fault for such errors and as a result treated the problem as a team problem and not an individual one. Thus, one wonders why in this case Respondent felt it necessary to go further in an attempt to pad its case against Wesley.

One also wonders why, in light of the evidence that the written disciplinary scheme was not being followed at the time of Wesley's discharge, did Wesley get fired for an alleged offense that only resulted in a verbal warning to Michael Way? By way of contrast an employee named Michael Cole whose name appears on an antiunion petition received a verbal warning for some production errors on December 14, 1993. He received another verbal warning for unsatisfactory work and failing to follow instructions on May 6, 1994. He received another verbal warning for a similar offense as part of a team warning on October 6, 1994. He received a fourth verbal warning for smashing dies on October 31, 1994. On December 30 the day Wesley was fired, he received his first written warning for running too many pieces, exceeding the number needed. On Cole's warning Detterline wrote, "Consequence should incident occur again—suspension." was not suspended nor terminated as a result of these warnings. Cole was not on the organizing committee. Detterline testified that suspensions were not being issued at this time. Why then would she warn an employee that that discipline would be forthcoming if he erred again?

Some other prominent examples of disparate treatment of Wesley as compared to other employees are worth noting. Team member, Jason Mills, who was not in support of the Union, was treated by Respondent in a more favorable way than Wesley. On June 17 Mills was issued a verbal warning for a cutting error. On December 30 he received a written warning for the same chalk related problem that Wesley was allegedly discharged over. The warning document states under "Consequences should incident occur again—Termination." Mills, did, in fact, commit another production error on January 18, 1995, when he overcut pieces. Unlike the case with Wesley, rather than being terminated, Mills was issued a 3-day suspension, as the Company's disciplinary scheme calls for. Don Young is another employee who was treated in a more favorable manner by Respondent. On January 25 Young received a verbal warning for improper tally stamps. On June 8 Young received the same verbal warning given Wesley for smoking in a nonsmoking area. Thereafter, on June 21 Young received another verbal warning, this time for an incident involving smashed dies. It is noteworthy that these three warnings correspond exactly with the type of warnings Wesley received prior to the chalk incident. On September 10 Young committed another production error and for his fourth offense, he only received a written warning. This is the very same incident for which Wesley received her third warning. Young was ultimately discharged for willfully destroying company property. These examples of disparate treatment in the severity of the discipline issued to Wesley compared to that given other employees strongly supports a finding that unlawful motivation was behind Wesley's termination.

While I certainly believe it is Respondent's right to be concerned about chalk related problems and issue discipline for such problems, given the timing of the event shortly after Wesley's union-related run-ins with Putt and Winkler and the rarity of warnings given for chalk-related problems, I believe that Respondent was looking for a reason to fire her and seized on the incidents of December 27–28 as an excuse to do so. Respondent can cite examples where it gave lenient disciplinary treatment to other known union supporters, an employee named Donald Ickes would be one, and it can argue correctly that it did not engage in widespread harassment of known union supporters to assert that it did not fire Wesley for her union activity. However, Wesley is the only union supporter shown in this record to have had direct disagreements which resulted in either disparagement of union supporters thrown up to her (by Putt) or veiled threats of termination made to her (by Winkler). I believe that the General Counsel has made a strong prima facie showing that union animus was a motivating factor in the decision to terminate Wesley and that Respondent has failed to convincingly demonstrate that it would have terminated her even in the absence of her protected activity. Accordingly, I find that by discharging Wesley on December 30 Respondent engaged in unlawful conduct in violation of Section 8(a)(1) and (3) of the Act.

3. Did Respondent violate the Act by discharging its employee Dana Endres?

Dana Endres was employed by Seton as an incremental press team member from January 1993 until his discharge in March 1995. His supervisor was Jim Eichelberger, who reported to Tina Detterline. Endres supported the union campaign and was

on the in-house organizing committee. He also engaged in house calls on fellow employees to solicit their support for the Union. He wore union insignia on his clothing at work. Endres was a more active union supporter than most. He had received a verbal warning in June for smoking in a nondesignated area, another verbal warning in July for customer returns, and another verbal warning in December for failing to follow instructions. The last two warnings were issued to the entire team on which he worked.

For some time prior to his discharge, he worked on press Team 543 with coemployees Jody Giarth, Vicky Mathes, and Patty Wise.[20] On the team, Endres and Giarth primarily did layout and Mathes and Wise picked. At some point in late January 1995 the team was audited and shutdown for excess chalk. At the outset of the week in which this incident occurred, the team had been told by Tim Brennan to be careful about excess chalk. A large number of pieces were involved and the team had to clean them. Endres questioned the pickers Mathes and Wise about why so many pieces had escaped their attention. Eichelberger told them to forget it and get back to work.

At quitting time that day Detterline told the team there would be a meeting about the audit in the office with production manager Herbert Winkler. She indicated that the meeting would be about getting along better as a team. In fact, Winkler did encourage the team to get along and no discipline resulted. On cross examination, Endres added that at this meeting, Mathes complained about stress on the team and said she was offended at Endres having become loud and questioning her ability. She added she wanted off the team. Winkler warned Endres about the way he spoke to women. Endres responded that he would not talk to them. A couple of weeks passed and Endres noted Mathes showing Eichelberger a rejected piece. This upset Endres because he felt the pickers should first show a problem piece to the layout person involved to see if the problem can be corrected. Mathes had not shown the piece to Endres prior to showing it to the supervisor. Endres then commented to Giarth that he thought they were being set up.[21] Though he and Giarth had laid out the leather on the bed, Wise and Mathes had run the bed into the press. Endres told Wise and Mathes that in the future, he and Giarth would run the bed and they would just pick. Mathes and Wise did not respond. Later, Detterline came to the team and said there would be another meeting. After the shift, the team members met with Detterline who told them that if they did not get along better, she would breakup the team. No discipline resulted from the meeting. Detterline did tell them to check the bulletin board on March 17, 1995, as it would show what teams had been reorganized.

On March 17, 1995, Endres came to work and checked the bulletin board and found that team 543 had in fact been split, with each member being assigned to a different team. The change was to take place on March 20, 1995. This upset Endres because he considered his pairing with Giarth to be beneficial as they worked fast and well together. In any event, he punched in and went to his press. There, an employee going off shift asked him why he was upset. The employee knew he was upset as Endres had thrown his lunchbox into the shelf where he kept it. He told the employee that he was upset because his team had been broken up. The employee asked why that had happened and Endres replied, "Because of the fucking bitches," referring to Wise and Mathes. According to Endres, he was unaware that these two employees were in the immediate area and heard him. Endres denied that he made this uncomplimentary remark directly to them. Under these circumstances, the team began work. About an hour or 2 later, Detterline came to the press and said she was removing Wise and Mathes for the rest of the evening. Detterline said they did not like being called fucking bitches. She informed the team that there would be a meeting at the end of shift with Herbert Winkler.

James Eichelberger was a group leader of Endres' team. He testified that there were personality conflicts on the team and the team had been called to meetings to address the problem. The team had split in two, with two employees wanting to work with each other, but not with the other two. Endres and Jodie Giarth were on one side with Wise and Mathes on the other. Eichelberger recalled that Wise was uncomfortable with Endres because he wanted her to approve parts he cut that she thought did not meet quality specifications. Eichelberger was called in on occasion to make the quality decision. He testified that on these occasions Endres was frustrated by the refusal of Wise and Mathes to accept his view about quality. The team, though troubled, was not split earlier because their production numbers were good. On the day of the Endres incident, Eichelberger was told that Endres had referred to Wise and Mathes as fucking bitches.

Vickie Mathes testified that on the day in question, she arrived for her shift and met Wise and together they went to their workstation. She was aware at the time that their team was to be split up, having seen the posted notice. When they got to the workstation Endres was there and said to an employee going off shift, "It's those fucking bitches fault that our team is being split up." Endres then looked at Mathes and Wise. Other employees coming off the shift questioned why Mathes put up with such language. For the next 20 minutes the team worked. Mathes remembers Endres yelling at the employee who would be Mathes' new partner that Mathes was a fucking bitch and she would be sorry she had to work with her. Mathes testified that she and Wise were in tears. At break Wise said she was going home and Mathes said they should talk to Detterline. Detterline listened to them, moved them to another team, and said she would call Herbert Winkler. Patty Wise corroborated this testimony adding that Endres was very upset and referred

[20] There are two Patty Wises working at the Saxton facility. One is supervisor, Patty Wise, about whom much has already been written here. The other Patty Wise is an incremental press operator who played a part in the Endres discharge.

[21] According to Endres, when the bed is run into the press if its bumped, the dies can shift resulting in bad cuts, inferring that Wise and Mathis had bumped the bed and caused the problem. He felt that Mathis and Wise were trying to cause a scene and have him disciplined because they did not like him. He indicated his union activity had nothing to do with the problems between himself and the two women. The only reason he believes that his union activity played a part in his termination is that he was terminated rather than being suspended as the disciplinary procedure calls for.

to them repeated as fucking bitches while they worked that night. I credit the two women's testimony that Endres continued to verbally abuse them after they started work.

A meeting was held with all four team members and Herbert Winkler, Detterline, and Eichelberger. According to Endres at this meeting, Winkler began by saying that every member would be given the opportunity to talk about the team. Giarth was then asked about what had been said. She noted she was not present when the incident occurred. Winkler then asked Endres what happened. Endres told him he was upset about the team being broken up as he thought he worked well with Giarth. He testified that he did not deny calling his teammates fucking bitches. However, on cross examination it was pointed out that in his affidavit he told the Board agent that he initially told Winkler that he had told Giarth a joke and she laughed, and perhaps Wise and Mathes thought they were laughing at them. Winkler asked what the joke was and Endres told him a joke. Mathes told Winkler that she did not like working with the stress on the team and wanted to move. Wise told him the same thing. At this point, Endres admitted saying fucking bitches. Again, according to Endres, the meeting ended with Winkler asking for his phone number. Giarth and Endres then left the meeting and Wise and Mathes remained. Later that day, Endres received a call from Julie Reed in human resources, who told him to meet with Mark Taylor on March 20, 1995, about his termination.

Mathes testified that at this meeting Winkler first asked Endres what he had said to the two women and Endres said he had said nothing, merely had told an off color joke. Winkler asked him to repeat the joke and Endres said he did not like to talk like that in front of women. Winkler smacked the table with his hand and looked upset. He demanded Endres tell him the joke and Endres told a joke that Mathes said left Winkler not believing Endres. Winkler then asked Giarth what happened and she said she did not know. Mathes then told Winkler what really happened and Detterline and Eichelberger confirmed her story. Wise testified about this meeting and remembered it generally the same as Mathes, except she remembered Endres ultimately admitting calling the women fucking bitches.

Herbert Winkler testified that he was called by Detterline who told him Endres had used foul language and had upset two female members of the team who were very upset and visibly shaking. He had Detterline reassign the women to another team until he could investigate.

According to Winkler, at the meeting he called, Mathes and Wise were still visibly upset, crying and shaking. Winkler said it was very unusual for employees to be in his office crying. According to Winkler, he first asked Giarth about the incident and she denied knowledge. He then asked Endres if he used foul language directed toward Mathes and Wise and Endres denied doing so. Mathes and Wise then told him what was said by Endres. He remembers Endres admitting using the language before the meeting ended.

Winkler remembered two prior meeting of the team in which Endres use of foul language was addressed.[22] Winkler made some handwritten notes about the incident. After reciting basically what he testified about they contain his thoughts on the incident. In this regard they read:

> Personally, I have had enough with Dana. This is the third time I spoke to him about his behavior/performance. Vickie and Patty were in tears this morning. They were really concerned returning to work on Sunday night. No person, union or not union, has to put up with this behavior! What makes it worse, other employees become affected by this type of rudeness! We better take a hard look at this situation, and again, I really think we need H.R. personnel covering all three shifts so that we can listen to employees' problems before it comes to a peak. I recommend Dana should be fired on the spot considering how he already has two write ups. We need to send a message onto the floor! Furthermore, I really need your help in this matter, for it has taken hours away from me being able to do my job right on the production floor. Enough is Enough!" "PS: Do we have to revise `foul language' in our criteria book for proper action taken?[23]

At the meeting on the 20th, Taylor told him he was being terminated for abuse and harassment, and referred to Endres calling Mathes and Wise fucking bitches. Endres complained that he did not think it fair to be terminated for using a word one time. Taylor responded that the language was not suitable for the plant and that they felt they had grounds for termination.[24]

I find that with respect to Endres, the General Counsel has established Respondent's animus and that Respondent knew of Endres support for and activities on behalf of the Union. As opposed to the situations with Wesley and Hiquet, I have trouble finding unlawful motivation. Endres admittedly did what he is accused of doing, at least to having referred to Mathes and Wise as fucking bitches. According to him, he admitted it to Winkler at the meeting held with the team after the incident. The only factual dispute about the incident is whether he continued to verbally abuse Wise and Mathes after the first time he called them fucking bitches. I credit Mathes and Wise in their testimony that he did continue. Both of these women appeared to be credible witnesses. Endres was shown by his own testimony to have initially lied to Winkler about what he said to the

[22] Clearly at the meeting held with the team to discuss the chalk related matter, Endres was warned by Winkler to watch the way he spoke to women. This is by Endres own admission. See Tr. 560. There is no clear evidence that he was warned about this a second time before he was terminated.

[23] The General Counsel relies on this memo and particularly the reference to "union or not union" to establish that Winkler's antiunion animus motivated his decision to fire Endres. I do not agree. The "union or not union" refers to the employees being abused and not the abuser. I have no clear idea of what Winkler was thinking when he wrote it, but the phrase is equivocal and subject to a number of interpretations. It certainly does not clearly establish unlawful motivation.

[24] On February 16, 1995, Seton issued a memo to employees which stated: "I understand that emotions may be running high right now and encourage everyone to limit their discussion to the issues. I am taking this opportunity to remind everyone that harassment, threats and obscenities toward fellow employees will not be tolerated and my result in disciplinary action up to and including termination. If you feel you are being harassed, immediately contact your group leader or Mark Taylor."

women. Based on his willingness to lie about the matter to Winkler and the demeanor of the witnesses in general, I credit the testimony of Wise and Mathes over that of Endres. The General Counsel seeks to minimize the seriousness of what Endres did. I cannot agree with this position. I observed both Mathes and Wise and to the date of hearing the incident still visibly affects them. Winkler also appeared to me to be a person who would react strongly to such a situation and he noted in his testimony that it was rare for employees to come to his office and cry. I believe that Winkler did react strongly to the situation, perhaps overreacted, but not out of any unlawful motivation.

There is nothing in the timing of the discharge to suggest that it was improperly motivated. The election had been called off and the campaign appeared to be stalled. Endres had not gotten into a confrontational situation with management as had Wesley. He was not an obviously desirable target of discrimination as was James Hiquet's daughter. His supervisor, Eichelberger, had just prepared a favorable evaluation for him. Even Endres admitted he expected discipline to result from the incident, though not termination.

Aside from certain credibility arguments made by the General Counsel which I reject, the General Counsel relies on the lack of an investigation, evidence of disparate treatment, and the memo from Winkler. I will address these points.

First, the General Counsel finds it suspect that Respondent did not conduct an "investigation" into the incident before firing Endres. I do not believe that one was needed. The incident was reported to Detterline by Wise and Mathes and she in turn reported the matter to Winkler. Winkler called all the involved employees into his office and listened to each. At this meeting, Endres admitted calling the women fucking bitches. I cannot find that there was more to investigate. I have already found that Winkler's memo setting out his thoughts about the incident does not in my opinion establish unlawful motivation.

The General Counsel then finds the fact that the documentation of the termination is in memorandum form rather on a standard preprinted disciplinary form is proof of unlawful motivation. I cannot accept this contention. I do not find the form on which the termination is document to prove anything. If Respondent were trying to cover up an unlawful act, it would have been more likely to make sure nothing was out of the ordinary. The record also reflects that other discharges, not alleged to have been unlawful, are similarly documented.

Next, the General Counsel adduced substantial testimony to establish that profanity is tolerated in the workplace by management and in fact, some profanity was shown to have emanated from persons in management. Yet only one of the established incidents of profanity were shown to have been directed at another employee in that employee's presence. This incident occurred in October 1995 and involved Vickie Mathes and another employee. According to the documentation of the incident, Mathes and another employee, David Donaldson, got into an argument over a piece of scrap and Donaldson swore at Mathes. What he said is not in evidence. Detterline did not issue any discipline over this matter when Mathes said she was not upset over the matter and Donaldson apologized. Not knowing what Donaldson said, I cannot say that this incident constitutes disparate treatment.

The General Counsel introduced evidence of one other incident that could constitute disparate treatment. According to documentation related to it, in November 1993 employee Dan Harding was assaulted by employee Penny Barton outside the finishing plant cafeteria. Taylor testified that Barton slapped Harding because of some comments he had made to others about her sex life. The two employees met with Taylor and Herbert Winkler. Taylor testified that he and Winkler were about to discipline Barton when the two admitted they were being childish. Taylor testified that they decided not to discipline either upon being told that neither of the employees wanted to hold the other accountable. I would agree that this situation probably called for discipline as much as the Endres incident. On the other hand, there are differences in the Barton-Harding incident and the Mathes-Donaldson incident as compared with the Endres incident. In the other two incidents, by the time of meeting with management, both sides were over their dispute and willing to forget it and/or apologize for errant behavior. This was clearly not the case with Endres and his two teammates. Endres in fact at first lied to Winkler denying that he had verbally abused his teammates. I do not find that these two isolated incidents establish unlawful motivation.

Winkler did suspend an employee named Ed Hess for saying in Detterline's presence, "I hate my fucking job." This profanity was not directed at Detterline on any personal basis as was Endres profanity.

Lastly, the General Counsel points out that a suspension would have been the proper discipline had Respondent followed its written disciplinary scheme. I have already found that Respondent did not follow this scheme with any consistency. What struck me as evidence of disparate treatment in this regard with Wesley was that Respondent skipped a step and fired her, over an offense that was questionable in the first place, and for which it only gave another involved team member a verbal warning. Based on the evidence, including the testimony of Winkler, I believe he terminated Endres because he felt that the offense was severe enough to justify termination and not for any unlawful reason. I will recommend that the complaint allegation relating to Endres be dismissed.

D. Should Respondent Prevail on its Affirmative Defenses?

In its amended answer dated April 7, 1997, Respondent has raised a number of affirmative defenses. First, Respondent contends that it has been denied due process with respect to the allegations contained in paragraphs 9, 19, 11, 12, 13, 15, 16, 17, 23(b), and 25 of the amended complaint. Respondent further contends that the allegations set forth in those same paragraphs are time barred pursuant to Section 10(b) of the Act. In addition, Respondent contends that the allegations contained in paragraphs 10(c), 11, 15, 16, 17, and 23(b) were the subject of unfair labor practices charges which were investigated and subsequently dismissed by the Region or withdrawn by the Charging Party.

It is well established that the burden of proof of proving an affirmative defense lies with the party asserting it. *Marydale Products Co.,* 133 NLRB 1232 (1961); *Sage Development Co.,*

301 NLRB 1173, 1189 (1991). I find that Respondent has failed to meet its burden of proof as to all of its affirmative defenses.[25] Inasmuch as Respondent's asserted affirmative defenses relating to due process and Section 10(b) involve the same paragraphs of the amended consolidated complaint, they will be discussed together.

Initially it is noted that a charge is not a pleading and does not require the specificity of a pleading. It merely serves to initiate a Board investigation to determine whether a complaint should issue. *NLRB v. Fant Milling Co.,* 360 U.S. 301 (1959). The complaint is not restricted to the precise allegation of the charge. So long as there is a timely charge, the complaint may allege any matter closely related to, or growing out of, the controversy which produced the charge, or which relates back to or defines the charge more precisely. *Fant Milling Co.,* supra; *National Licorice Co. v. NLRB,* 309 U.S. 350 (1940). The Board precedent makes it clear that complaint allegations of coercive acts aimed at thwarting a union campaign may be deemed closely related to—or having a sufficient nexus with—charge allegations of coercive acts in resistance to that campaign. This is so whether the acts are of precisely the same kind and whether the charge specifically alleges the existence of an overall plan on the part of the employer. *Recycle America,* 308 NLRB 50 (1992). In *Recycle America,* the Board upheld complaint allegations (interrogation, solicitation of grievances with the implied promise of remedying them, and solicitation of employees to campaign against the Union) even though the specific conduct in the complaint had not been alleged in the original or amended charges and even though the specific allegations in the charge (threats and wage increases) were found to lack merit at the investigative stage. The Board found that the conduct was actionable since it was part of an overall effort to resist unionization and since the charge and complaint allegations occurred in the same general time period. See also, *Marshall Durbin Poultry Co.,* 310 NLRB 68 (1993).

All of the instant complaint allegations, including those raised as part of its affirmative defenses involving independent violations of Section 8(a)(1) of the Act, arise from the UMW organizing campaign and Respondent's resulting unlawful efforts to resist unionization. Thus, as early as the second amended charge in Case 6–CA–26593 filed October 31, 1994, the Charging Party alleged the following as part of Respondent's unlawful conduct in this campaign:

> On or about July 31, 1994, the above-named employer, by its officers, agents and representatives, has, by creating the impression that its employees' union and concerted activities are under surveillance by the employer, and other acts and conduct, interfered with, restrained and coerced its employees in the exercise of rights guaranteed under Section 7 of the Act.

Subsequently timely amended charges alleging independent violations of Section 8(a)(1) of the Act include those filed on June 7, 1995, in Cases 6–CA–26746; 6–CA–27045; 6–CA–27071–1; 6–CA–27071–3; and on June 8, 1995, in Case 6–CA–27128–2. These timely filed amended charges contain, inter alia, allegations relating to those raised in Respondent's affirmative defenses such as its discriminatorily applying an overly broad no-solicitation/no-distribution policy; threats of termination; the creation of an impression of surveillance; threats of plant closure; implied threats of plant closure; interrogation, threats of partial plant closure; implied threats of discipline; and indirectly threatening employees with unspecified reprisals if they did not support an antiunion drive. As to paragraph 23(b) of the amended consolidated complaint involving the unlawful refusal to hire Thressa Hiquet, the Charging Party filed a timely charge in Case 6–CA–27142 on March 21, 1995, as amended on June 8, 1995.

Timely charges were filed with respect to all the complaint allegations placed in issue by Respondent and it has not met its burden of proof with respect to this issue. Moreover, in addition to the timely charges filed by the Charging Party, Respondent has been on notice of the allegations contained in paragraphs 9, 10, 11, 12, 13, 15, 16, 17, and 23(b) of the amended consolidated complaint dated February 7, 1996, since those same allegations were set forth in the earlier consolidated complaint which issued on June 9, 1995. Inasmuch as the hearing did not commence until April 8, 1997, Respondent certainly has not been denied due process. This is particularly true, given the fact that the hearing was in recess between April 11 and May 12, 1997, after counsel for the General Counsel had already presented the vast majority of its prima facie case with respect to these issues. Thus, Respondent had the benefit of an entire month to review the transcript and prepare its witnesses on all the issues raised in the complaint paragraphs set forth in its affirmative defenses.

Likewise, Respondent has failed in its burden of proof to establish that the allegations contained in paragraphs 10(c), 11, 15, 16, 17, and 23(b) were either dismissed or withdrawn. Initially, it is noted that Respondent presented no probative testimonial evidence to specifically establish what particular allegations were investigated vis-a-vis each specific charge. Obviously, during the course of this long and hard-fought organizing campaign, many unfair labor practice allegations were raised by the Charging Party, some of which were determined to be meritorious and others of which were not. However, without the benefit of testimonial evidence, it generally is impossible to discern from the documentary evidence alone, what particular allegations were dismissed or withdrawn, particularly as they relate to allegations of independent violations of Section 8(a)(1) of the Act.

Nevertheless, certain documents that are part of the record establish that Respondent has failed in its burden of proof. The allegation in paragraph 10(c) involving an implied threat of discipline is contained in the amended charge in Case 6–CA–27071–3. The dismissal letter dated June 9, 1995, in that same case specifically retained the allegations involving implied threats of discipline. Paragraphs 15 and 16 both contain allegations of unlawful threats of plant closure. The amended

[25] Par. 11 of the amended consolidated complaint is merely a factual pleading which sets forth Respondent's no-solicitation/no-distribution rule and is not alleged as being an independent violation of the Act. The rule is set forth in sec. 9.3 of Respondent's employee handbook. Thus, par. 11 which contains the rule provides the underlying factual support for par. 12 which alleges that Respondent enforced the rule in a selective and disparate manner. Par. 25 was withdrawn as part of the overall informal settlement agreement reached as to certain complaint allegations prior to the hearing and is not at issue here.

charges in both Cases 6–CA–27071–1 and 6–CA–27071–3 contain allegations of threats of plant closure and other acts and conduct. These particular allegations were retained in separate dismissal letters dated June 9, 1995. The underlying charge in support of paragraph 17 relating to the antiunion petition is set forth in the amended charge in Case 6–CA–27128–2 dated June 8, 1995, and was retained in the dismissal letter which issued on June 9, 1995. Finally, the complaint allegations with respect to paragraph 23(b) relating to the failure and refusal to hire Thressa Hiquet are closely related to the allegations set forth in the amended charge in Case 6–C–27142 filed on June 8, 1995. Thus, it is clear that Hiquet's own union activity is intertwined with that of her father by virtue of their familial relationship and Respondent's knowledge of that relationship. Nothwithstanding the absence of a specific reference to the union activities of Hiquet's father in the amended charge, a sufficient nexus exists between the allegation in the complaint and the underlying amended charge and the complaint allegation to support the complaint allegation. See *Well-Bred Loaf,* 303 NLRB 1016 (1191); *Recycle America,* supra; *Delta Metals,* 236 NLRB 1665 (1978). I find that Respondent has failed to meet its burden of proof with respect to this issue as well as all of the affirmative defenses raised in its answer.

CONCLUSIONS OF LAW

1. The Respondent, Seton Company, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent engaged in conduct in violation of Section 8(a)(1) of the Act, by:

(a) About July 31, 1994, by supervisor, Clair Horton, creating an impression among employees that their union activities were under surveillance.

(b) About September 14, 1994, by supervisor, Jim Donaldson, impliedly threatening employees with discipline if employees talked about the Union.

(c) About mid-February 1995, by supervisor, Jim Donaldson, interrogating employees about their union membership, activities, and sympathies.

(d) About mid-February 1995 by supervisor, Jim Donaldson, impliedly threatening employees with discipline if the employees talked about the Union.

(e) About September 1994 and on two occasions in mid-February 1995 by Donaldson at the die shop, enforcing its no-solicitation/no-distribution rule selectively and disparately applying it only against employees supporting the Union.

(f) About early January 1995 by supervisor, Wayne Claar, by telephone, creating an impression among its employees that their union activities were under surveillance.

(g) About February 10, 1995, by Respondent's agent, Projections, Inc., engaging in surveillance of Respondent's employees and creating the impression that their union activities were under surveillance.

(h) About mid-February 1995, by supervisor, Michael Clouse, threatening its employees with plant closure if the union campaign were successful.

(i) About February 15, 1995, by supervisor, Patty Wise, threatening its employees with plant closure if their union campaign were successful.

(j) About February 21, 1995, by Respondent's board chairman, Phillip D. Kaltenbacher, impliedly threatening employees with plant closure if the employees selected the Union as their representative.

4. Respondent engaged in conduct in violation of Section 8(a)(1) and (3) by:

(a) About November 15, 1994, and continuing to date, failing and refusing to hire Thressa Hiquet because of her union activities and those of her father.

(b) About December 30, discharging its employee Lynn Wesley.

5. The unfair labor practices found to have been committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not commit other unfair labor practices as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged its employee Lynn Wesley, it must offer her reinstatement within 14 days of the Order here and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent, having discriminatorily failed and refused to offer employment to Thressa Hiquet, it must, within 14 days of the date of the Order, offer her an appropriate position at its Saxton, Pennsylvania, facility and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from November 17, 1994, to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.

Within 14 days from the date of the Order, remove from its files any reference to the unlawful discharge of Lynn Wesley and notify her in writing that this has been done and that the discharge will not be used against her in any way.

[Recommended Order omitted from publication]